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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, et al.,

Appellants,

against

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants* appeal from the judgment of the United States District Court for the Southern District of New York entered September 15, 1977, enjoining the enforce-

* In addition to the present chairman of the N.Y. State Racing and Wagering Board, appellants include its other members, Bertram D. Sarafan (chairman at the commencement of this action) and Joseph H. Boyd, Jr.; the term of former member Eugene J. Keogh, defendant below, having expired. See U.S. Sup. Ct. Rules, Rule 48 (3). Also appealing are Hugh L. Carey and Louis J. Lefkowitz respectively, Governor and Attorney General of the State of New York. The Governor was apparently named as defendant because of his general executive responsibilities, N.Y. Const. Art. IV, § 3 and the Attorney General because of his responsibility to appear in defense of constitutionality of statutes, N.Y. Executive Law § 71.

ment of N.Y. Unconsolidated Laws § 8022 as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions and Judgment Below

The opinion of the Three-Judge District Court for the Southern District of New York is reported at 436 F. Supp. 775 and is reproduced in the appendix beginning page 3a. The judgment appealed from is reproduced beginning at page 1a of the appendix. The opinion of the District Court granting appellee's motion to convene a three-judge court is not yet reported. It is reproduced beginning at page 23a of the appendix.

Jurisdiction

The judgment of the District Court was entered on September 15, 1977. Notice of Appeal was filed September 26, 1977.

The jurisdiction of this Court to review the judgment by appeal is conferred by 28 U.S.C. § 1253. See, *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975).

Questions Presented

1. Does a statute providing for summary suspension of the occupational license of a racing industry participant, pending hearing and determination of disciplinary changes, deny licensees due process or equal protection of the laws?

2. Should the District Court have abstained from determining this case until the State courts had ruled on the availability of administrative stays to appellee?

3. Was appellate barred from challenging the statute governing disciplinary action against harness racing licensees by reason of his acceptance of a license?

Statute Involved

New York Unconsolidated Laws § 8022, which is reproduced at footnote 1 of the District Court's opinion, at page 4a.

Statement of the Case

This is an appeal from a judgment of a three-judge District Court for the Southern District of New York, enjoining enforcement of N.Y. Unconsolidated Laws § 8022 as being in violation of the due process and equal protection clauses of the Fourteenth Amendment.

Appellee, a licensed trainer of harness race horses, instituted this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), challenging the constitutionality of N.Y. Unconsolidated Laws § 8022 as applied to him. He claimed that § 8022 denied him the right to due process of law in that it denies a licensee a pre-suspension hearing; and, that this statute violated his right to equal protection of the laws because § 8022 precluded stays pending review to harness racing licensees, whereas such a restriction does not apply to thoroughbred racing licensees, (3-5a).*

On July 10, 1976, appellee Barchi's license to train harness race horses was ordered suspended for 15 days by

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* "Appellee also contended that the Board's rules, 9 NYCRR §§ 4116.11, 4120.5 and 4120.60, reproduced at page 5a, establish a constitutionally improper presumption of guilt with respect to the trainer's responsibility drugging of horses and making the trainer an "insurer" of his horse's conditions as a matter of law. Although the court sustained the rule on its face, in view of the disposition of the case, the issue of whether the rule was properly applied was never reached (20-21a).

John F. Fay, presiding steward and judge at Monticello Raceway. This penalty was imposed after traces of the drug "Lasix" had been found in the urine of "Be Alert", one of the horses entrusted to his case. This followed a routine test performed on June 24, two days after "Be Alert" placed second in the third race at Monticello. The administration of such treatment to a harness racing horse within 48 hours is prohibited by New York State Racing and Wagering Board Rule 9 NYCRR 4120.4, (6-7a).

The District Court issued a temporary restraning order on July 13, 1976 enjoining the Board from further execution of its decision. On December 23, 1976, defendants' motion for dismissal of the complaint for lack of subject matter jurisdiction was denied and a three-judge district court was convened, per GOETTEL, J., (5-6a, 23a).

The Board urged the three-judge court to abstain until the State courts passed upon its contention that under its construction of § 8022, it was, in fact, authorized to stay the suspension of a harness racing license, relying upon *Carey* v. *Sugar,* 425 U.S. 73 (1976), (9a). The court acknowledged this doctrine, but felt that the New York Court of Appeals' decision in *Tappis* v. *N. Y. State Racing and Wagering Board,* 36 N Y 2d 862, 330 N.E.2d 697 (1975) constituted authoritative disposition of the question herein. thus paving the way for federal court adjudication, (10-11a).*

The Court held that N.Y. Unconsol. Laws § 8022 was unconstitutional as violative of Barchi's right to due process under the Fourteenth Amendment because it permitted revocation or suspension of a harness race horse trainer's license without either a pre-suspension or prompt post-suspension hearing, (21a).

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* *Tappis* upheld the constitutionality of the Board's rule permitting fines without prior hearings and did not speak to the issue presented here with respect to the Board's construction of its regulations to permit a stay to be granted upon a hearing.

The District Court looked to the nature of the interest to be protected and held it to be an "interest [which] can be an entitlement subject to due process consideration" (13a). The court felt that the statutory protections did not comply with due process procedures according to the balancing of interests involved, as set forth in *Matthew* v. *Eldridge,* 424 U.S. 319 (1976). The court acknowledged the substantial interest of the state, stating that "in appropriate circumstances [it] justifies summary suspension prior to hearing or formal determination" (13-15a). However, the court ruled that the private interest at stake was sufficient to override the state's interest so as to warrant prohibition of the unvariable application of pre-hearing suspension (15-16a).

The court also held that the prohibition of stays pending review in the harness racing industry without a parallel prohibition in thoroughbred racing constituted a denial of equal protection because of the state's failure to show a rational basis for this distinction (21a).

The questions presented herein are substantial

A.

New York is only one of at least twelve states whose racing laws provide for the summary suspension of a licensee pending a hearing on charges of misconduct. See: Delaware Code Ann. 28 § 325, Fla. Code Ann. 550.07, 550.33(2)(a); Ill. Ann. Stat. § 37-16; Kentucky Rev.Stat. 230.320, Md. Ann. Code 78B § 10, Mass. Gen. Laws Ann. 128 A § 11, Mich. Compiled Laws 431-41(3); Montana Rev. Code 62-507, NJ Stat Ann 5:5-51, 52; N.Y. Unconsol. Laws § 8022; Ohio Rev. Code Ann. 3769091; Pa.Stat. Ann. 15 § 2670, W.Va. Code 19-23-2, 3, 16(c). Thus, the instant case will, necessarily, have nation-wide impact.

By voiding New York's disciplinary system, which regulates an industry long recognized to be subject to the state's

police power, *Western Turf Ass'n* v. *Greenberg,* 204 U.S. 354, 363 (1907) and that, but for special legislative dispensation, would be illegal, N.Y. Const., Art. I, § 9, *Ailano* v. *Westchester Racing Ass'n,* 265 App.Div. 225, 229, 38 N.Y.S. 2d 741, 745 (2d Dep't 1942), the District Court has decided the case at bar contrary to this Court's "due process" decisions in such cases as *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), governing discipline of civil servants. *Mathews* v. *Eldridge,* 424 U.S. 236 (1976), governing the discontinuance of disability benefits; *Montayne* v. *Haymes,* 427 U.S. 236 (1976); *Meachum* v. *Fano,* 427 U.S. 215 (1976); governing prison transfer; *Ingraham* v. *Wright,* U.S. (1976), governing corporal punishment in the schools and *Dixon* v. *Love,* 431 U.S. 105 (1977), governing summary suspension or revocation of a driver's license, all of which authorized the imposition of sanctions prior to a hearing. Even in *Goss* v. *Lopez,* 419 U.S. 565 (1975) governing the suspension of pupils from school, this Court authorized summary suspension to protect the safety of persons and property.

Moreover, two United States Courts of Appeals have already ruled that the state interest in regulating the racing industry outweighs the licensee's interest in obtaining a hearing prior to imposition of disciplinary action, *Ruane* v. *N. Y. State Racing & Wagering Board,* 532 F.2d 860 (2d Cir. 1976) and *Hubel* v. *West Virginia Racing Comm.,* 513 F.2d 240 (4th Cir. 1975). See also, *Gilmour* v. *N. Y. State Racing & Wagering Board,* 405 F.Supp. 458 (S.D.N.Y. 1975).

Thus, the District Court ignored the long-established doctrine that "due process, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 at 895 (1961). It is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U.S. 471 at 481 (1972). With regard

to the deprivation of a "liberty" or "property" interest, "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge, supra,* 424 U.S. at 333 (1976).

While in some circumstances, a hearing is required prior to the deprivation of a protected interest, see *Goldberg* v. *Kelley,* 397 U.S. 254 (1970); *Bell* v. *Burson,* 402 U.S. 535 (1971), this Court repeatedly held that an opportunity to be heard need not be given until some time *after* such deprivation. *Mathews* v. *Eldridge, supra; Arnett* v. *Kennedy, supra; Goss* v. *Lopez, supra; Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600 (1974); *Dixon* v. *Love, supra.*

The District Court, perhaps under constraint of the Second Circuit's *Ruane* decision, *supra,* gave lip service to *Hubel* v. *West Virginia Racing Commission, supra.* However, by attempting to draw factual distinctions that would show pre-hearing sanctions to be inappropriate (15a, et seq.), that court completely ignored the holding of *Hubel* that a state may, *under all circumstances,* despite any loss that a licensee might incur, provide for an absolute pre-hearing suspension rule for racing licensees.

"The state has at least two substantial interests to be served. It has a humanitarian interest in protecting the health of the horse, and it has a broader and more weighty interest in protecting the purity of the sport, both from the standpoint of protecting its own substantial revenues derived from taxes on legalized pari-mutuel betting and protecting patrons of the sport from being defrauded. Collectively, these interests, we think, justify the severe penalty of disqualifying a horse that has been drugged, its trainer and perhaps its owner, from further participation in legalized racing until the matter can be heard and determined and an appropriate final sanction formulated. The combination of strict liability, imposed by Rule 793, and immediate suspension without the possibility of stay, deters

tampering and promotes care. The combination also removes from racing those who have proved either unable or unwilling to protect their horses from unauthorized drugs."

Hubel, supra, 513 F.2d at 243.

The decision of the District Court is further undermined by the fact that it was the deliberate failure of the appellee to seek a hearing under § 8022 that prevented the Board from providing an adequate forum for a final disposition of the disciplinary charges.

As we have demonstrated above, the decisions of this Court, the *Hubel* and the *Ruane* cases, *supra,* it is constitutionally permissible, because of the needs of public safety and welfare, to summarily suspend a horse racing license in a drugging case.* The contrary holding of the District Court is plain error and should be reversed.**

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* Since the commencement of this action, New York has provided in its State Administrative Procedure Act § 401(3), that

> If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered, effective on the date specified in such order or upon service of a certified copy of such order on the licensee, whichever shall be later, pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

The absence of such a finding proved determinative to an intermediate appellate court in *Matter of Gerard* v. *Barry,* —— A D 2d —— (2d Dep't, November 9, 1977), a recent *cause celebre* involving the alleged substitution of horses at Belmont Park by a veterinarian and a trainer. Whether the State Court of Appeals will apply this portion of the Administrative Procedure Act to this case is unknown at this time. However, in the light of *Hubel, supra,* "drugging cases will always present a threat to public safety and welfare."

** The District Court completely ignored one of appellant's threshold arguments, i.e., whether appellee was estopped from chal-

(footnote continued on following page)

B.

In view of the District Court's ruling on appellee's due process claim, its consideration of the equal protection issue was both unnecessary and improper, *Peters* v. *Hobby,* 349 U. S. 331, 338 (1955). In any event, an affidavit submitted by the Board's counsel and chief steward to the Court (28a) and counsel's offer of proof made at argument before the three-judge court, to the effect that harness racing and thoroughbred racing licensees were treated alike in disciplinary matters, because of the way in which the Board construed the statutes, raised sufficient question as to their meaning as to have required the District Court to abstain, *Railroad Commission* v. *Pullman,* 312 U.S. 496 (1941) and *Judice* v. *Vail,* 430 U.S. 327 (1977) and *Carey* v. *Sugar,* 425 U.S. 73 (1976).

In attempting to justify its refusal to abstain, the District Court erroneously relied upon *Matter of Tappis* v. *N. Y. State Racing & Wagering Board, supra.* However, in that case, the New York Court of Appeals limited its decision to the narrow question of the constitutionality of imposing a fine upon a licensee prior to a full hearing. In upholding the constitutionality of such a rule, the Court

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lenging the disciplinary system for harness racing licensees, by reason of having applied for and accepted licensure. As opposed to the question of whether appellee had an interest protected by due process, which is not denied, see *Hubel,* 513 F2d at 242. This is an unsettled question of law which has not been, but should be decided by this Court.

This Court's past decisions have produced conflicting authority on this point, compare *Ashwander* v. *T.V.A.,* 297 U.S. 288, 323, 348 (1936), which precluded a challenge where a statute's benefits have been accepted, with *W. W. Cargill Co.* v. *Minnesota,* 180 U.S. 452, 468 (1901), *contra.* In its most recent comment on this issue, this Court has only underscored the uncertainty that exists over whether the beneficiary of a statute may challenge its constitutionality, see *Arnett* v. *Kennedy,* 416 U.S. 134, 153 (1975).

never reached the issue of whether the applicable statutes and regulations permitted the Board to stay its own suspension pending administrative review.

CONCLUSION

Probable jurisdiction should be noted.

Dated: New York, N. Y.
December 2, 1977

Respectfully submitted,

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• Counsel gratefully acknowledges the assistance of Ms Elise Hagouel Langsam, SUNY at Buffalo, School of Law, class of 1978, and a Legal Aide at the Attorney General's office.

Final Judgment Appealed From.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 3070 GLG

JUDGMENT

JOHN BARCHI,

Plaintiff,

—against—

BERTRAM D. SARAFAN, as Chairman and JOSEPH H. BOYD, JR. and EUGENE J. KOEGH, as Members of the New York State Racing & Wagering Board, Division of Harness Racing, HON. HUGH CAREY, Governor of the State of New York, and HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

Plaintiff, having commenced an action against defendants pursuant to 42 U.S.C. 1983 for judgment declaring § 8022 of the Unconsolidated Laws of the State of New York to be unconstitutional and invalid and to nullify the fifteen (15) day suspension imposed upon plaintiff by defendants commencing on the 10th day of July, 1976 and defendants having duly served and filed an answer to the complaint and plaintiff having moved this Court for the convening of a three judge court pursuant to 28 U.S.C. 2881 for the purpose of making a constitutional determination and by order of United States District Court Judge Gerard L. Goettel entered the 23rd day of December, 1976, a three judge court having been convened and the issues herein having come on to be heard by said three judge court on the 4th day of May, 1977 and Joseph A. Faraldo

Final Judgment Appealed From.

having appeared on behalf of the plaintiff and Jesse Moss having appeared Amicus Curaie on behalf of Standardbred Owner's Association in support of the complaint and Assistant Attorney General Robert Hammer having appeared on behalf of the defendants in opposition thereto and due deliberation having been had thereon and the Court having rendered its opinion and order on the 18th day of August, 1977,

Now, on motion of Greco & Faraldo, attorneys for the plaintiff, it is hereby,

ADJUDGED AND DECREED that § 8022 of the Unconsolidated Laws of the State of New York be and the same are hereby declared to be unconstitutional in that it permits the State to irreparably sanction a harness race horse trainer without a pre-suspension or a prompt post-suspension hearing in violation of plaintiffs' right to due process and it prohibits stays of execution of suspension orders pending review of cases of harness racing personnel with a parallel prohibition in thoroughbred racing cases, a separate classification lacking a basis reasonably connected to the State's interests, in violation of plaintiffs' right to equal protection of law and defendants be and they are hereby enjoined from enforcing said statute and it is further,

ADJUDGED AND DECREED that the fifteen (15) day suspension imposed upon plaintiff, to have commenced on the 10th day of July, 1976 had it not been stayed by this, be and the same is hereby declared to be invalid and nullified.

Dated: New York, New York
September 14, 1977

GERARD L. GOETTEL
United States District Court Judge

JUDGMENT ENTERED—9/15/77
RAYMOND F. BURGHARDT
Clerk

Opinion of Three Judge District Court.

John BARCHI, Plaintiff,

v.

Bertram D. SARAFAN, as Chairman and Joseph H. Boyd, Jr., and Eugene J. Keogh, as Members of the New York State Racing & Wagering Board, Division of Harness Racing, Hon. Hugh Carey, Governor of the State of New York, and Hon. Louis J. Lefkowitz, Attorney General of the State of New York, Defendants.

No. 76 Civ. 3070 (GLG).

United States District Court,
S. D. New York.

Aug. 18, 1977.

As Amended Sept. 5, 1977.

Greco & Faraldo, Kew Gardens, for plaintiff; by Joseph Faraldo, Kew Gardens, of counsel.

Louis J. Lefkowitz, Atty. Gen., New York City, for defendants; by Robert S. Hammer, New York City, of counsel.

OPINION

Before TIMBERS, Circuit Judge, and GRIESA and GOETTEL, District Judges.

GOETTEL, District Judge.

Plaintiff, John Barchi, is a duly licensed harness racing trainer. Defendants are the New York State Racing and Wagering Board (NYSRWB) and the individual members

of the Board (the Governor and State Attorney General have also been cited as parties defendant). On July 12, 1976 plaintiff commenced this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343(3), 2281 *et seq.*, challenging the constitutionality of New York Unconsolidated Law § 8022[1] (McKinney 1961) and NYSRWB Rules 4120.5,

[1] New York Unconsolidated Law § 8022 provides:

> If the state harness racing commission shall refuse to grant a license applied for under this act, or shall revoke or suspend such a license granted by it, the applicant or licensee may demand, within ten days after notice of the said act of the commission, a hearing before the commission and the commission shall give prompt notice of a time and place for such hearing at which the commission will hear such applicant or licensee in reference thereto. Pending such hearing and final determination thereon, the action of the commission in refusing to grant or in revoking or suspending a license shall remain in full force and effect. The commission may continue such hearing from time to time for the convenience of any of the parties. Any of the parties affected by such hearing may be represented by counsel, and the commission may be represented by the attorney-general, a deputy attorney-general or its counsel. In the conduct of such hearing the commission shall not be bound by technical rules of evidence, but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. In connection with such hearing, each member of the commission shall have the power to administer oaths and examine witnesses, and may issue subpoenas to compel attendance of witnesses, and the production of all material and relevant reports, books, papers, documents, correspondence and other evidence. The commission may, if occasion shall require, by order, refer to one or more of its members or officers, the duty of taking testimony in such matter, and to report thereon to the commission, but no determination shall be made therein except by the commission. Within thirty days after the conclusion of such hearing, the commission shall make a final order in writing, setting forth the reasons for

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4120.6 and 4116.11,[2] 9 NYCRR 4120.5, 4120.6, 4116.11 as they had been applied by the NYSRWB against him. Upon

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> the action taken by it and a copy thereof shall be served on such applicant or licensee, as the case may be. The action of the commission in refusing to grant a license or in revoking or suspending a license shall be reviewable in the supreme court in the manner provided by and subject to the provisions of article seventy-eight of the civil practice act. L.1940, c. 254, § 47; amended L.1954, c. 5, § 6; L.1954, c. 510, § 8; L.1959, c. 881, § 8, eff. July 1, 1959 (pocket part).

By provision of Unconsolidated Law § 8162 the New York State Racing and Wagering Board assumed the powers of the racing commission.

[2] The pertinent NYSRWB Rules provide as follows:

Rule 4116.11 Trainer's responsibility. A trainer is responsible for the condition, fitness, equipment and soundness of each horse at the time it is declared to race and thereafter when it starts in a race.

Rule 4120.05 Presumptions. Whenever the tests or tests prescribed in § 4120.1 hereof disclose the presence in any horse of any drug, stimulant, depressant or sedative, in any amount whatsoever, it shall be presumed:

(a) That the same was administered by a person or persons having control and/or care and/or custody of such horse with the intent thereby to affect the speed or condition of such horse and the result of the race in which it participated; (b) that it was administered within the period prohibited by subdivision (d) of § 4120.4 of this Part; and (c) that a sufficient quantity was administered to affect the speed or condition of such animal.

Rule 4120.6 Trainer's responsibility. A trainer shall be responsible at all times for the condition of all horses trained by him. No trainer shall start a horse or permit a horse in his custody to be started if he knows, or if by the exercise of reasonable care he might have known or have cause to believe that the horse has received any drugs, stimulant, sedative, depressant, medicine, or other substance that could result in a positive test. Every trainer must guard or cause to be guarded each horse trained by him in such manner and for such period of time prior to racing the horse so as to prevent any person not employed by or connected with the owner or trainer from administering any drug, stimulant, sedative, depressant or other substance resulting in a positive test.

plaintiff's posting of security the Court, on July 13, 1976, temporarily restrained defendants from further execution of the Board's disputed decision and defendants, in turn, moved for dismissal of the complaint for lack of subject matter jurisdiction. On December 23, 1976, defendants' motion was denied and a three-judge court was convened. (Two companion cases, making similar constitutional challenges, brought after the abolition of three-judge courts on August 13, 1976 have been held in abeyance pending the decision of this Court.)

The facts which gave rise to the case are these: "Be Alert" is a harness race horse, owned by an uninvolved third party, and trained at the time this suit was brought by the plaintiff. On June 22nd, "Be Alert" ran in the third race at Monticello Raceway[3] and placed second. Two days later plaintiff was informed by the presiding steward[4] at Monticello that a post-race urinanalysis revealed the presence of "Lasix"[5] in "Be Alert's" system. Such treatment of a harness race horse is improper within forty-eight hours of a race and violates NYSRWB Rule 4120.4. Barchi declared his innocence in the matter. Thereafter, he was not given access to the analysis, the specimen, and was never confronted with the circumstances under which it was taken.

On June 28th plaintiff voluntarily took a polygraph examination in an effort to establish his non-involvement. The examiner reported that the plaintiff was not lying. A subsequent polygraph examination was administered to

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[3] The harness track is located in Sullivan County, New York and its race "meeting" schedule is of approximately seven months duration each year.

[4] *See* N.Y.Uncons.Law § 8009 (McKinneey 1961).

[5] "Lasix" is acknowledged by the parties to be a drug used to clear a horse's sinuses but which may have a stimulative effect on an animal's race performance.

plaintiff at the behest of the NYSRWB the next day and the results were similarly exculpatory. Nevertheless, on July 10th, plaintiff received a fifteen-day suspension for violation of the so-called trainer's "insurer" rule from John Fahey, the presiding steward and judge at Monticello. During the period of his suspension no horse of which he was the trainer would be allowed entry in races at the track.

Race horse trainers may be entrusted with the care of a number of trotters at any given time. A trainer's income is derived in large measure from the proceeds of horse races (as opposed to a salary), and, since, harness "meetings" are sporadic, trainers cannot recapture the racing opportunities lost by missed meetings. Once a trainer is suspended, even for a brief period, an owner will immediately seek the services of another trainer so that the horse is not barred from racing. This change is often permanent in order to avoid further disruption in the care of the animal. Significantly, plaintiff has proffered the affidavit of a third-party trainer/driver who experienced just such a loss during a suspension for a similar drug infraction. He had also suffered irreparable damage for a subsequent *ex parte* suspension that was later reversed. Racing opportunities lost because of a suspension cannot be recovered by a later reversal in an review hearing for obvious reasons. Furthermore, defendants do not dispute the fact that a loss of horses in a trainer's stable occasioned during his suspension can often be an irremediable injury, even though such suspension is erroneous and without justification.

Defendants note that at Monticello (and presumably at other NYSRWB harness tracks) a prohibition on medication of horses within 48 hours of a race is enforceable since entries are made three days prior to race time. At Monticello, the horses for all the day's races are brought into a state-secured paddock prior to the first race of the day.

Pre-race tests are performed there to determine if a horse has been drugged. (Pre-race testing is not done on thoroughbred race horses.) "Be Alert's" pre-race blood test was negative. (A different type of test, after the race, detected the drug.)

Defendants admit that an unsuccessful attempt was made to determine the actual party responsible for the drugging of "Be Alert" and that only after such efforts proved fruitless was plaintiff suspended under the trainer "insurer" rule. This action was deemed necessary by the judges "to protect the integrity and reputation of the sport and to insure public confidence." Defendants note that, historically, both harness tracks and state authorities have found it imperative that racing be conducted fairly both in fact and in appearance and that even the specter of impropriety has been enough to cause disorders at the tracks, with resulting jeopardy to the safety of members of the public and the industry. (There is no indication that the events in dispute here caused any such disorders.)

Plaintiff challenges Section 8022 on due process and equal protection grounds. He contends, with respect to the former, that the statute denies a trainer any opportunity to confront and contest an accusation of dishonesty before a suspension has been both ordered and, in many cases, executed. On equal protection grounds the plaintiff contests the prohibition on stays which exist in the harness racing provisions of the Unconsolidated Laws but which do not exist in the thoroughbred racing provisions. Finally, plaintiff challenges the NYSRWB Rules which establish a presumption of deliberate drugging and make the trainer an "insurer" of his horses' conditions as a matter of law.

Defendants respond by asserting that the procedures established by Section 8022 and the NYSRWB Rules are a valid exercise of the state police power and are a fair response to the potential for corruption in the heavily regu-

lated racing industry. Furthermore, they argue that this Court should not exercise jurisdiction over plaintiff's claims until the New York state courts have been given an opportunity to review the issues presented. While this action is clearly within the jurisdiction of the Court, the defendants argue for abstention from the exercise of such jurisdiction pending an "authoritative" state interpretation of Section 8022, citing *Carey* v. *Sugar,* 425 U.S. 73, 96 S.Ct. 1208, 47 L.Ed.2d 587 (1976) and *Zwickler* v. *Koota,* 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967).

A federal court's discretion to abstain, in cases otherwise within the court's jurisdiction, when the controversy involves unsettled issues of state law, was first extensively discussed in *Railroad Commission of Texas* v. *Pullman,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). In reversing a three-judge court's decision enjoining enforcemeent of a Texas Railroad Commission order, Justice Frankfurter criticized the wisdom of basing federal constitutional determinations (in *Pullman,* a Thirteenth Amendment decision) on unsettled state law foundations. In such situations, *Pullman* reasoned, the trial court should abstain from deciding the case until the state court decides the state law issues. 312 U.S. at 500, 61 S.Ct. 643.

While the *Pullman* doctrine has been expanding in recent cases, *see, e.g., Trainor* v. *Hernandez,* —— U.S. ——, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); *Juidice* v. *Vail,* —— U.S. ——, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); *Younger* v. *Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971);[6] the clearest statement of the test to be applied in the instant case is found in *Harman* v. *Forssenius,* 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965). In that case the Supreme

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[6] The instant case does not come within the *Younger* abstention doctrine because there is no state court action presently pending. *See Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 3 n.1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

Court reviewed a three-judge court's decision striking down a Virginia poll tax provision as violative of Art. I, § 2 and the Seventeenth Amendment to the Constitution. In reaching a decision on the merits the court refused Virginia's request for abstention in order to first allow the state courts to pass on the state law. In affirming the lower court refusal to abstain, the Supreme Court stated:

> Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law and premature constitutional adjudication. *E.g., Railroad Comm'n* v. *Pullman Co., supra.* The doctrine, however, contemplates that deference to state court adjudication only be made where the issue of state law is uncertain. . . . Thus "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 415-16 [84 S.Ct. 461, 465, 11 L.Ed.2d 440].

Harman v. *Forssenius,* 380 U.S. at 534-35, 85 S.Ct. at 1182.

Is the question concerning the constitutionality of Section 8022 an open question of state law? We think not. In *Tappis* v. *New York State Racing and Wagering Board, Harness Racing Division,* 36 N.Y.2d 862, 370 N.Y.S.2d 922, 331 N.E.2d 697 (1975), the Court of Appeals, in a review of sanctions against a harness trainer, explicitly upheld the constitutionality of the provisions challenged in the instant case. The Appellate Division had set aside the confirmation of a fine levied on a trainer in accordance with its holding that the NYSRWB Rules permitting fines without prior

hearings were unconstitutional. 46 A.D.2d 613, 359 N.Y.S.2d 780 (1st Dep't 1974). The Court of Appeals reversed, and held that

> [t]he compelling and substantial State interest involved in maintaining discipline among trainers and owners . . . so as to preclude the appearance or the fact of impropriety, justifies on-the-spot sanctions and penalties in advance of hearings, and the procedure . . . followed involved no infringement of petitioner's constitutional rights and complied sufficiently with the requirements of the due process clauses of the Federal and State Constitutions.

36 N.Y.2d at 863, 370 N.Y.S.2d at 923, 331 N.E.2d at 698.

[1] Thus, as to the threshold due process question, the State of New York has clearly passed upon Section 8022. With regard to equal protection, the statute explicitly states that pending an administrative hearing "the action of the commission . . . in revoking or suspending a license shall remain in full force and effect." While there may be some doubt whether, in the absence of such mandatory language, a rule absolute could be inferred, the present state of Section 8022 needs no further clarification. Conversely, Section 7915 clearly contains no such prohibition when dealing with sanctions in thoroughbred racing. Where no uncertainty exists in state law there is no need for federal deference to a state court ruling. *Davis* v. *Mann,* 377 U.S. 678, 690, 84 S.Ct. 1441, 12 L.Ed.2d 609 (1964).[7]

Section 8022 permits the presiding NYSRWB Steward to revoke or suspend a harness race horse trainer's license

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[7] It might also be noted that this opinion will result in little interference with state functions since defendants argue that they already have the power to follow the procedures mandated herein.

by issuing notice of such action. Within ten days after notice the licensee may make a demand for a review hearing before the full Board. The Board must, in turn, "give prompt notice of a time and place for such hearing" but may continue the hearing "from time to time for the convenience of any of the parties." When the hearing is completed the Board has 30 days to issue a final order. Pending final order, the original suspension or revocation remains in full force and effect. Thus, it is clear that, even without continuances of the review hearing, a trainer may wait over a month for a review decision. During this time, as the parties concede, a brief suspension, such as is involved here, will have been completely served. Exoneration by a review board cannot restore lost racing dates and terminated training contracts.

Defendant argues that the trainers accept their licenses with full knowledge and understanding of the NYSRWB rules and procedures and, therefore, cannot be heard to complain about them. In addition, the state points to its compelling interest in insuring honest racing in an industry that provides large sums of money for the state treasury. Furthermore, the need to protect the public from dishonesty and from the potential for violence that attends public perception of racing dishonesty justifies the strict enforcement standards in the harness race industry.

[2-4] In evaluating a due process claim the Court's focus is not upon whether the plaintiff's interest is a "right" as opposed to a "privilege." *Board of Regents* v. *Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Consequently, defendant's argument that a licensee cannot complain of the terms of enforcement in a regulated industry is not persuasive. The appropriate opening question for the Court concerns the *nature* (as opposed to the *weight*) of the interest to be protected. *Goss* v. *Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Board of Regents* v. *Roth,*

supra. A licensee's interest can be an entitlement subject to due process consideration, especially when the suspension or revocation by the licensing body is based upon a determination of licensee fault or misconduct. *Bell* v. *Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); see also *Connell* v. *Higginbetham,* 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971). Therefore, it is the Court's finding that the nature of a trainer's license in New York and the state's *ratio decendi* in suspending it entitles the holder to due process protection.

[5] Once an interest is found to warrant due process consideration, it must be decided which protections are particularly applicable. *Morrissey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). As Justice Powell has noted in *Arnett* v. *Kennedy,* 416 U.S. 134, 168, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (concurring opinion), the procedures which due process requires under a given set of circumstances depend upon balancing the governmental interest against the private interest affected. Conducting a hearing prior to termination is not a rigid requirement of due process. *Board of Regents* v. *Roth, supra.* The state may, even in the absence of dire peril or an imminent emergency, demonstrate the primacy of its interests over those of the plaintiff and, in such cases, termination may precede a promptly-held post-termination hearing. *Goss* v. *Lopez, supra; Arnett* v. *Kennedy, supra.* In *Matthews* v. *Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) the Supreme Court has fashioned the following factors applicable to a due process determination:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures

> used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional substitute procedural requirements would entail.

Matthews v. *Eldridge,* 424 U.S. at 335, 96 S.Ct. at 903.

The private interest at stake is, simply, the right to a livelihood. Plaintiff has convincingly demonstrated that a trainer, once his license is suspended, rightly or wrongly, is potentially subject to a loss of clients and an irretrievable loss of income from any race meeting in progress. The state, undeniably, has compelling interests to be considered. Racing is a strictly-regulated activity in New York. Defendant correctly notes that there is a heavy flow of cash in racing, both in purses and wagers, as well as substantial tax revenues from levies on racing. As has been aptly observed by Judge Weinfeld, in *Gilmour* v. *N.Y.S. Racing & Wagering Board,* 405 F.Supp. 458, 460-61 (S.D.N.Y.1975):

> [t]he state's interest essentially reflects the public interest that sports be honestly conducted, which extends to the avoidance of even the appearance of impropriety in connection with pari-mutuel betting. The state also has a substantial monetary interest since it receives vast sums from the proceeds of racing meets. . . . .
>
> [S]uspicious race results have resulted in fans rioting at race tracks, causing both personal injury and property damage. Thus, the need to maintain strict vigilance against race fixing and to take immediate steps against dishonest drivers and owners is of prime importance in the long run and perhaps in the short run as well. It is important to the public no less than to those who run the raceways.

[6] The state's interest in preventing fraud at the track and in insuring public confidence is substantial and, in appropriate circumstances, justifies summary suspension prior to hearing or formal determination. *Hubel* v. *West Virginia Racing Commission,* 513 F.2d 240 (4th Cir. 1975). It remains to be considered, however, whether the invariable application of this procedure, from which no stay is available, provides constitutional due process when the reviewing process becomes meaningless.

It can be stated with certainty that the plaintiff's interest in this case is more substantial than those private interests in both *Arnett* v. *Kennedy, supra* and *Goss* v. *Lopez, supra,* since the loss herein is both irreparable and substantial.

In balancing the relative weight of these interests against the state's it is well to note that even though the state alleges a need for immediate action, the initial suspension decision in plaintiff's case took sixteen days. In light of the time the state is presently taking in such matters, requiring either a stay, as allowed in thoroughbred racing, or a prompt hearing if same is granted, results in little "interference" in track supervision. A prompt hearing and determination could well have been conducted within the sixteen days the state took in imposing its "immediate" sanctions in the case. Moreover, since Section 8022 already provides for Board review hearings, requiring the expedition of such hearings is a scant additional burden for the state.

Another of the *Eldridge* factors to be considered is the risk of an erroneous deprivation extant in the current procedures. Plaintiff has argued that the combination of the presiding Steward's power to suspend immediately and the Board's power to control the pace of the hearings, make the review by the Board an exercise in futility and renders the initial suspension order, in fact, irreversible. There is an inherent revulsion against a system which,

as has occurred in this case, favors quick sanctions, even in the face of a demonstration of innocence, at the expense of an accurate determination of responsibility. In the present case, the plaintiff submitted himself to two polygraph examinations, one at the Board's behest. Both examinations indicated plaintiff's innocence in the drugging of "Be Alert." There would appear to be little more that the plaintiff could have done to demonstrate a lack of culpability. Nevertheless, the presiding Steward ordered a suspension. No great urgency was apparent here. A hearing prior to the administering of sanctions, or a stay pending review, would have given the Commission the opportunity to review the Steward's action.

[7, 8] The opportunity to be heard in review of a state sanction must be available in a meaningful manner and at a meaningful time. *Armstrong* v. *Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). On balance, the Court concludes that the absence of either a pre-suspension hearing or a *prompt* post-suspension hearing denies plaintiff the meaningful review due process requires. *Bell* v. *Burson, supra; Armstrong* v. *Manzo, supra.*

Plaintiff's equal protection challenge to Section 8022 is based upon a distinction with New York Unconsolidated Law Section 7915,[8] the procedure for suspension and revo-

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[8] N.Y.Uncons.Law § 7915 provides, in pertinent part:

> No license shall be revoked unless such revocation is at a meeting of the state racing commission on notice to the licensee, who shall be entitled to a hearing in respect of such revocation. In the conduct of such hearing the commission shall not be bound by technical rules of evidence, but all evidence offered before the commission shall be reduced to

(footnote continued on following page)

cation of persons licensed in the thoroughbred race horse industry, which is substantially identical to Section 8022's procedures, excepting the absence in the former of prohibition of stays of execution of suspensions and revocations pending review. Plaintiff argues that this difference in treatment is an unconstitutional denial of equal protection of law. Defendant's response is unique. After having argued in opposition to the due process challenge, that swift, even Draconian, enforcement is a necessary weapon in the regulation of harness racing, defendant now argues on the equal protection issue that the NYSRWB has "interpreted" Section 8022 and Section 7915 to allow stays of execution in both types of racing and that, as a matter of practical operation, the NYSRWB has attempted to treat all racing personnel in the same manner. Defendant claims that since the Board has decided that it can, as a matter of administrative grace, grant stays in the harness industry, there are no differences in treatment between thoroughbred and harness racing and, therefore, there is no equal protection issue.

(footnote continued from preceding page)

> writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. The action of the commission in refusing, suspending or in revoking a license shall be reviewable in the supreme court in the manner provided by and subject to the provisions of article seventy-eight of the civil practice act. Such hearing may be held by the chairman thereof or by any commissioner designated by him in writing, and the chairman or said commissioner may issue subpoenas for witnesses and administer oaths to witnesses. The chairman or commisioner holding such hearing shall, at the conclusion thereof, make his findings with respect thereto and said findings, if concurred in by two members of the commission, shall become the findings and determination of the commission.

[9] As is noted in the order of December 23, 1976, Section 8022 creates no "suspect classifications"[9] and involves no "fundamental interests."[10] Therefore, the test to be applied in evaluating an equal protection claim is "traditional"—whether or not the classification is without a reasonable basis. *Shapiro* v. *Thompson,* 394 U.S. 618, 638 n.20, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). In other words, is there a rational state interest (in the protection of the integrity of harness racing) reasonably connected to classifying the harness racing sector (in which stays are prohibited) separately from the thoroughbred racing section (in which stays are not)? Defendant argues that the disparate treatment is justifiable because the harness racing meetings are more susceptible to corruption and, therefore, the Section 8022 enforcement system is a necessary bulwark of integrity and public confidence in the harness sector. Defendant has been offered an opportunity to prove the existence of such difference and to prove that they reasonably relate to the differences in treatment effected by Sections 7915 and 8022 but has not come forward with any proof. Where the state attempts to justify such action "as a rational means for the accomplishment of some significant state policy [it] requires more than a bare assertion based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy." *Carey* v. *Population Services*

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[9] *See, e.g., Brown* v. *Board of Education,* 347 U.S. 483, 74 S.C. 686, 98 L.Ed. 873 (1954) (race); *Examining Board of Engineers, Architects and Surveyors* v. *Flores De Otero,* 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976) (alienage); *but see San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (rejecting "wealth").

[10] *See, e. g., Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to travel); *Dunn* v. *Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (right to vote).

International, —— U.S. ——, ——, 97 S.Ct. 2010, 52 L.Ed. 2d 675 (1977).

While greater dishonesty (if it exists) may counsel greater diligence in the enforcement of NYSRWB rules in the harness industry, it bears little relation to the stay-prohibitive classification set up by Section 8022. The grant or denial of a stay is an individual determination. Even if a factually unsupported assertion of greater corruption in the harness industry is accepted by the Court, there is no relationship between a stay's availability and such probabilities of corruption.

> A legislative classification must contribute substantially to the achievement of the state's purpose. . . . [G]rossly overinclusive or underinclusive classifications should not readily be tolerated. Nor should a reviewing court defer to imaginable facts that might justify the classification. But account should be taken of legislative realities and the need for legislative flexibility. In short, a legislature should be able to adopt any means that are reasonably effective in achieving a valid legislative end or ends. *Boraas* v. *Village of Belle Terre,* 476 F.2d 806, 821-22 (2 Cir. 1973) (dissenting opinion), *rev'd,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

[10] If the state could show that harness racing was more prone to corruption or fradulent manipulation, then there might be justification for imposing stricter sanctions, but it has hardly supported the separate procedural classification established by Section 8022. The record is devoid of any rational state interest reasonably connected to the differences in treatment accorded harness and thoroughbred personnel. The Court finds, therefore, that the prohibition of stays pending review in harness racing constitutes a denial to plaintiff of equal protection of law and

is a further constitutional impediment to the enforcement of the rules.

The final question for the Court is whether NYSRWB Rules 4116.11, 4120.5 and 4120.6 establish a constitutionally improper presumption of guilt. While the parties seem to be in agreement that Rule 4120.5 establishes a presumption of fact as to a drugged horse and that Rules 4120.6 and 4116.11 establish the trainer as an insurer of a horse's condition as a matter of law, these interpretations have never had the benefit of state court interpretation. The earliest case on the constitutional standards applicable to presumptions is *Mobile, J & K.C.R. Co.* v. *Turnipseed,* 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910) which dealt with a Mississippi statutory presumption of railroad negligence upon proof of employee injury suffered in the course of employment. In sustaining the operation of the presumption the Court opined that the equal protection test to be applied to a presumption was whether there was a rational connection between the fact proven and the ultimate fact presumed. The Supreme Court has retained this "rational connection test" in subsequent cases. *Tot* v. *United States,* 319 U.S. 463, 63 St.Ct. 1241, 87 L. Ed. 1519 (1943); *McFarland* v. *American Sugar Co.,* 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 899 (1916).[11]

[11] Plaintiff concedes that the evidentiary presumption is rebuttable. The Court finds that the duty of a trainer to oversee his horses is sufficiently connected to the occurrence of tampering to support the presumption established by

[11] While a shift to the more stringent "reasonable doubt" standard may be occurring in criminal cases, *see Turner* v. *United States,* 396 U.S. 398, 416, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); *Leary* v. *United States,* 395 U.S. 6, 36 n. 64, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); it does not apply to the case at bar.

the trainer's "insurer" rules. The state's definition of trainer responsibility is reasonably related to the interests involved and, given the rebuttable nature of the 4120.5 presumption, the high standard of accountability is not unconstitutional. Whether the application of the rules in plaintiff's case was constitutionally proper is not a matter we need consider in light of the absence of an opportunity for meaningful administrative review.[12]

Therefore, the Court finds N.Y.Uncons.Law Section 8022 unconstitutional for two distinct reasons. First, it permits the state to irreparably sanction a harness race horse trainer without either a pre-suspension or a prompt post-suspension hearing, in violation of plaintiff's right to due process. Secondly, it prohibits stays of execution of suspension orders pending review in cases of harness racing personnel without a parallel prohibition in thoroughbred racing cases—a separate classification lacking a rational basis reasonably connected to the state's interests—in violation of plaintiff's right to equal protection of the law.

SO ORDERED.

GRIESA, District Judge, concurring.

I concur with the majority opinion, insofar as it declines to rule unconstitutional NYSRWB Rules 4120.5, 4120.6 and 4116.11, 9 NYCRR 4120.5, 4120.6 and 4116.11.

I also concur with the majority holding as to Section 8022, but with a few additional comments.

Section 8022 gives the Board discretion to impose sanctions, such as revocation of license, prior to hearing. The

[12] Had a stay been granted and had the Commission upheld the steward's action, exhaustion of state remedies would appear to be prerequisite to application for relief by this Court, particularly in light of the absence of authoritative New York State construction of the "insurer risk."

statute provides for a hearing by the Board at the request of an aggrieved party, but states:

> "Pending such hearing and final determination thereon, the action of the commission in refusing to grant or in revoking or suspending a license shall remain in full force and effect."

The majority opinion interprets this language as *prohibiting* the Board from granting a stay of a sanction pending a hearing. Thus, as the majority reads the statute, the Board or its representative has the power to impose immediate severe economic sanctions without a hearing, and is prevented from even considering an application for a stay pending a hearing no matter what good cause is shown.

Although it might be possible to construe the statute in some other way, I must agree that the majority's interpretation is based upon the obvious meaning of the language. And, under this interpretation, there are the violations of due process and equal protection which the majority condemns.

However, in my view (and I believe this to be the meaning of the majority opinion also) Section 8022 would not be constitutionally defective, if the language quoted above about the prohibition on stays were eliminated or were replaced with a provision allowing the Board to have the discretion to grant a stay pending a hearing. This means that the statute would be constitutionally proper if it granted the Board the discretion to impose pre-hearing sanctions, if this were coupled with the discretion to stay such sanctions pending a hearing.

Opinion Convening Three-Judge District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 3070 (GLG)

OPINION

JOHN BARCHI,

Plaintiff,

—against—

BERTRAM D. SARAFAN, as Chairman and JOSEPH H. BOYD, JR. and EUGENE J. KEOGH, as Members of the NEW YORK STATE RACING & WAGERING BOARD, Division of Harness Racing, HON. HUGH CAREY, Governor of the State of New York, and HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

APPEARANCES:

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Opinion Convening Three-Judge District Court.

GOETTEL, D. J.

The plaintiff questions the constitutionality of certain regulations of the New York State Racing and Wagering Board and seeks the convocation of a three-judge court, pursuant to 28 U.S.C. § 2881, for the purpose of making this constitutional determination.[1]

The plaintiff is a harness racing trainer licensed by the New York State Racing and Wagering Board ("Board"). On June 22, 1976, one of the horses trained by him, "Be Alert", participated in the third race at the Monticello (New York) Race Track, placing second. On June 24, 1976, an official of the Board advised the plaintiff that tests revealed the existence of the drug "Lasix"[2] in the horse's system. Rule 4120.4 of the Board's regulations proscribes the use of "Lasix" within forty-eight hours before a race. Plaintiff responded by denying any knowledge of, or involvement in, the alleged treatment. On June 28th and on June 29th, the plaintiff underwent separate polygragh examinations (the former arranged by the plaintiff, the latter by the Board), both of which indicated that his denial of wrongdoing was truthful.

Read together, Rules 4120.5, 4120.6 and 4116.11 of the Board provide the presumption that, when a harness racing horse has been drugged, it was either administered by the trainer or resulted from his negligence in failing to adequately protect against such occurrence. In apparent reliance upon this so-called "insurer" rule, the Board suspended plaintiff for fifteen days as a result of the drugging of "Be Alert", effective July 10, 1976.

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[1] This action was commenced shortly before the effective date of the amendment to 28 U.S.C. § 2881.

[2] "Lasix" is a type of medication prescribed to clear the sinus cavity of a horse. Its use, however, has the attendant effect of improving the animal's endurance for a short time after its administration.

Opinion Convening Three-Judge District Court.

Section 8022 of the Unconsolidated Laws of New York provides that the decision of the Board to suspend the licensee is appealable, with an attendant right to a hearing, within ten days after notice of suspension. However, the Commission has up to thirty days after this hearing within which to issue its final written order. Consequently, for all intents and purposes the fifteen-day suspension imposed upon the plaintiff would most assuredly have run before his appeal would be decided. Section 8022 prohibits the imposition of temporary relief from this suspension pending appellate administrative review of the Board's action.

On July 12, 1976, the plaintiff brought this action seeking that these provisions be declared unconstitutional.[3] Plaintiff contends that as a result of the suspension the horse owners must hire new trainers, due to the need to maintain continuous care for their animals. Therefore, the plaintiff faces not only the loss of income during the suspension period but, more seriously, the likelihood of permanent loss of employment where an owner may wish to avoid another change in the personal care of the horse. A restraining order was entered by the Court staying enforcement of the penalty pending further order of the Court.

The Court is presently faced with a motion by the defendant to dismiss the complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. As a result of a recent statutory amendment drastically limiting the use of three-judge panels, effective August 13, 1976, (*see* 45 U.S.L.W. 1, August 12, 1976), this will be one of the last instances where

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[3] The jurisdictional predicate for the attacks on Section 8022 and Rule 4105.8(f) was 42 U.S. § 1983 and 28 U.S.C. §§ 1343(3), 2281 et seq., and it was suggested that the remaining claim rested on pendent jurisdiction.

review by such panels is available. It is still the function of a single judge, however, to determine whether the claim requires the convocation of the three judge court. For the reasons stated below it appears that such a forum is required here.

The underlying rationale for the three-judge court concept is the desire to minimize interference in state matters by the federal judiciary. *See generally* 1A(2) Moore's Federal Practice ¶ 0.205. Nevertheless, such review is available (with its attendant declaratory and injunctive relief potential) where there is a "substantial" constitutional attack upon a state statute. *Goosby* v. *Osser,* 409 U.S. 512 (1974). In determining "substantiality" the Supreme Court has formulated a two-pronged test. On the one hand, the Court has said that such a constitutional attack will fail as "insubstantial" where it is "obviously without merit", *Ex parte Poresky,* 290 U.S. 30, 32 (1933), "obviously frivolous", *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288 (1910), "wholly insubstantial". *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962), or "essentially fictitious", *id.* The instant claims, described below, clearly do not fall within these classifications.

The second aspect, concisely stated by the Court in *Goosby,* is that

> "claims are constitutionally insubstantial only if the prior decisions [of the Supreme Court] inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281."

409 U.S. at 518.

Section 8022 of the Unconsolidated Laws of New York contains the regulatory procedures of the State Harness Racing Commission with regard to the granting of licenses

and suspension and revocation of such licenses. It provides, *inter alia,* that within ten days after notice of suspension a licensee may demand a hearing before the Commission for the purpose of reviewing the Board's order. Section 8022 goes on to state that "[p]ending such hearing and final determination thereon, the action of the commission in . . . suspending a license . . . *shall remain in full force and effect.*" [Emphasis added.] The comparable regulations for thoroughbred racing are contained in Section 7915 of the Consolidated Laws of New York. Therein, unlike under the harness racing provision, no prohibition against a temporary stay pending administrative review exists. Based upon this statutory conflict plaintiff claims that he is being deprived of equal protection of the law since, as a harness racing licensee, he is expressly prohibited from obtaining temporary relief from his suspension while a similarly situated person in the thoroughbred racing industry is not so precluded.

In reviewing equal protection claims the courts have traditionally used a two-tiered analysis of the rights and interests involved. In situations involving "suspect classifications",[4] or "constitutional rights",[5] strict judicial scrutiny of the challenged classifications has been employed requiring proof of a "compelling state interest" in order to withstand the attack. *Shapiro* v. *Thompson, supra* at 638. We agree with the contention of the defendant that such rights are not involved in the instant case so that this degree of review is inappropriate here.

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[4] *See, e.g., Brown* v. *Board of Education,* 347 U.S. 483 (1954) (race); *Examining Board of Engineers, Architects and Surveyors* v. *Flores De Otero,* —— U.S. ——, 96 S.Ct. 2264 (1976) (alienage); *but see San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973) (rejecting "wealth").

[5] *See, e.g., Shapiro* v. *Thompson,* 394 U.S. 618 (1969) (right to travel); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972) (right to vote).

In other equal protection cases the courts have applied the "rational basis" test wherein, as the label implies, there is a search for a rational basis between the classification and the purported legislative objective. *Dandridge* v. *Williams,* 397 U.S. 471 (1970). Recent decisions of the Supreme Court suggest that even this test triggers meaningful consideration of the classification. *See e.g., Reed* v. *Reed,* 404 U.S. 71 (1971). *See generally* Gunther, The Supreme Court, 1971 Term—Foreword: In Search of *Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection,* 86 Harv.L.Rev. 1 (1972).

The record in the instant case, however, is presently devoid of "any state of facts [that] reasonably may be conceived to justify" the different treatment afforded those engaged in harness and thoroughbred racing. *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961). The only attempt to provide such a basis is the claim of the defendant that the two classes are not treated differently because, occasionally, the Board, in its discretion, ignores Section 8022 and grants stays of suspension notwithstanding the unequivocal language of the proviso.[6] This fails to provide a "rational basis" for the discriminatory classifications, and the equal protection claim, therefore, is sufficiently substantial to require its review by a three-judge panel.

As noted above, the Racing and Wagering Board's regulations can result in the administrative review of the Board's suspension order becoming academic by the time they are completed. Consequently, the plaintiff alleges that he has been deprived of meaningful administrative

[6] At pages two and three of his affidavit John M. Dailey, counsel to the Board and its Chief Steward, specifically states: "Although the regulatory statutes are worded differently, the Board has always interpreted them both to authorize it in its discretion to defer or suspend any penalty imposed by track judges pending administrative review."

review, as well as his right to a presuspension hearing, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meanings of the Due Process Clause of the . . . Fourteenth [Amendment]." *Mathews* v. *Eldridge,* 424 U.S. 319, 332 (1976). "Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits. *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972)." *Goss* v. *Lopez,* 419 U.S. 565, 572-73 (1975).

Plaintiff has a property interest which falls within the protection afforded by the Fourteenth Amendment. New York's statutes and rules relating to the horse racing clothe the plaintiff with an entitlement to certain benefits. Parimutuel betting on horse races is an exception to New York's general proscription against gambling. McKinney's Const. Art. 1, § 9(1). Consequently, the horse racing industry in New York is heavily regulated. *See generally* McK. Unconsol. Laws §§ 7901 *et seq.* The plaintiff-trainer, as a licensee within that industry, has a legitimate claim to continue as a trainer licensed by the Board and, as a consequence, to continue in his profession, absent just cause for suspension or revocation of his license. *Cf. Bell* v. *Burson,* 402 U.S. 535, 539, (1971).[7] Therefore, he "may demand the procedural protections of due process", *Goss* v.

[7] It may also be argued that the action of the Board imposed a sufficient stigma on the reputation of the plaintiff so as to trigger procedural due process safeguards. *Arnett* v. *Kennedy, supra,* 416 U.S. at 157; *Board of Regents* v. *Roth, supra,* 408 U.S. at 573; *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971). *But see Paul* v. *Davis,* —— U.S. ——, 96 S. Ct. 1155 (1976).

Lopez, supra at 573; *cf. Arnett* v. *Kennedy,* 416 U.S. 134, 164, (Powell, J., concurring), 171 (White, J., concurring and dissenting) (1974); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). "Having chosen to extend the right to . . . [engage in the horse racing business] to people of . . . [plaintiff's] class generally, . . . [New York] may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." *Goss* v. *Lopez, supra* at 574. "Once it is determined that due process applies, the question remains what process is due", *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972), because "[t]he types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Arnett* v. *Kennedy, supra* at 155. While the protections afforded the individual by the Due Process Clause may occasionally have to give way to the interests of the public and the state, such choices cannot be considered as failing to present substantial constitutional claims. New York State's Racing and Wagering Board's statutory scheme has never been tested by the United States Supreme Court on procedural due process grounds (or on any other basis for that matter). Furthermore, the decisions of the Court make one thing clear: what might be sufficient process in one situation, is woefully inadequate in others. The fluidity of the concept of procedural due process requires the weighing and balancing of many competing variables. The complexity of the interacting rights and interests here renders this claim patently "substantial", mandating closer inspection by a three-judge panel.

We are mindful of the general rule that the postponement of a hearing where an adequate one is subsequently provided, is permissible where a mere property right is

simply infringed. *Phillips* v. *Commissioner,* 283 U.S. 589, 596-97 (1931). *See Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600, 611 (1974). Although the penalty assessed plaintiff was in the form of suspension of his license rather than revocation, the ramifications of the Board's action (permanent loss of assignments because of the need for continuous care, no means of redress if successful on administrative appeal, and the potential for being deprived of working rights in other states)[8] serve to aggravate the situation so that it more closely resembles a permanent, rather than a temporary penalty. *See Catrone* v. *Massachusetts State Racing Com'n,* 404 F.Supp. 765, 770 (D.Mass. 1975) (court notes unwritten agreements wherein penalties imposed against licensees are honored by other racetracks in North America). It may be, therefore, that the plaintiff has a right to review of the charges against him *before* suspension, *Board of Regents* v. *Roth, supra,* 408 U.S. at 569-70, or, at the least, an immediate and speedy review, which, under the present scheme, he was not afforded. Thus, the contention that plaintiff was not afforded an opportunity to be heard "at a meaningful time", *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965), is substantial.

Furthermore, it appears on this record that the use of the inferences of the "insurer rule" may have resulted in the summary abridgement of plaintiff's license. The effect of the rule, therefore, may be that even if there had been an immediate hearing the results would have been the same since no defense or explanation would have been acceptable. However, this merely serves to compound the problem. The constitutionality of this inference is a serious, substantial question requiring review by the full panel.

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[8] In a somewhat related case which is presently before this Court, it was admitted in oral argument that a New Jersey racing facility refused stable space to a trainer-driver who was then under suspension at Yonkers Raceway. *Daigneault et al.* v. *Yonkers Racing Corp.,* 76 Civ. 3999.

Opinion Convening Three-Judge District Court.

For the reasons stated, the three procedural issues raise substantial federal constitutional questions which are more than sufficient to require convocation of a three-judge court. The defendants' motion to dismiss is hereby denied pending further consideration by the three-judge court, which is hereby convened.

SO ORDERED:

Dated: New York, N.Y.,
December 23, 1976.

GERARD L. GOETTEL
U.S.D.J.

Supreme Court, U. S.
FILED
MAY 24 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, et al.,

Appellants,

against

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Docketed December 5, 1977

Probable Jurisdiction Noted March 20, 1978

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Relevant Docket Entries.

76 Civ. 3070 BARCHI vs SARAFAN, GOETTEL, J.

DATE	NR.	PROCEEDINGS
12-76	1	Filed complaint and issued summons; and APPLICATION FOR 3-JUDGE COURT.
07-12-76	2	Filed pltfs affdt. and OSC with a temporary restraining order — Ordered that defts show cause on 7-20-76 in rm 506 at 10:30 pending determination deft. should not be temp. restrained from enforcing the determination of defts that trainer's license of pltf. be suspended, security in the sum of $1,500.00 shall be posted by pltf. within 48 hours and service is to be made by 7-13-75 by 5 pm — Ward, J.
07-12-76	3	Filed plantiff's memorandum of law in support of above order to show cause.
07-14-76	4	Filed bond #J9026009 for undertaking on injunction in the amount of $1,500.00 by Fidelity and Deposit Company of Maryland
07-16-76	5	Filed affdvt. of service of Order to Show Cause by Joseph Feraldo served upon — Bertram Sarafan, Joseph Boyd, Eugene Keogh on 7-13-76
07-16-76		—Filed affdvt. of service of Order to Show Cause by Rudolph E. Greco served — upon Hon. Louis Lefkowitz Atty. Gen. of NYS on 7-13-76
07-16-76		—Filed affdvt. of service by James Brandi of Order to Show Cause and Summons and complaint served—upon Hon. Hugh Carey, Governor of NY State on 7-13-76 (all under the same cover)
07-20-76	6	Filed pltf. supplemental affdvt. in support of pltf's motion for a temporary stay of injunction prohibiting enforcement of sect. 8022

Relevant Docket Entries.

DATE	NR.	PROCEEDINGS
07-20-76	7	Filed pltf. Amended Complaint
08-10-76	8	Filed pltf's Reply memorandum of law
08-18-76	9	Filed memo. end. on document #2 Adjourned to Aug. 17, 1976 at 10:AM Temporary restraining order continued in effect until further, order of this court So Ordered—Goettel, J. m/n
09-03-76	10	Filed affdvt. of Lucien Fontaine in re to his suspention
09-03-76	11	Filed affdvt. of affdvt. of Joseph A. Faraldo in opposition to the regulatory statutes are worded differently
10-04-76	12	Filed pltf's Reply memorandum of law
12-29-76	13	Filed affdvt John M. Dailey in opposition to pltfs motions
12-29-76	14	Filed defs memorandum of law
12-29-76	15	Filed defts supplementary memorandum of law
12-28-76	16	Filed OPINION #45477 . . . Defendants motion to dismiss is denied. Plaintiffs application for 3-JUDGE COURT under 28:2881 is hereby granted. Defendants motion was denied pending further consideration by the three-judge court, which hereby convened.—Goettel, J. m/n
04-13-77	17	Filed plaintiff's brief
04-13-77	18	Filed pltf's pleadings, order to show cause and asscopanying (sic) affdvts
07-15-77	19	*Filed Transcript of record of proceedings, dated* 5-4-77
08-19-77	20	Filed defts memorandum of lae (sic)
08-19-77	21	Filed deft. Standardbred Owners Ass'n brief Amicius

Relevant Docket Entries.

DATE	NR.	PROCEEDINGS
08-22-77	22	Filed ORDER designatting William H. Timbers US Circut Judge, Thomas P. Griesa US Dist. Judge in additional to Judge Goettel m/n
08-19-77	23	*Filed Transcript of record of proceedings, dated* 5-4-77
08-19-77	25	Filed OPINION #46286 On December 23, 1976 defts motion to dismiss was denied and a three-judge court was convened. The Court finds N.Y. Uncons. Law SEC. 8022 unconstitutional for two distinct reasons indicated herein a separate classification lacking a rational basis reasonably connected to the state's interests—in violation of pltf's right to equal protection of the law So Ordered Timers, C.J. Goettel, J.
08-24-77	26	Filed ANSWER of defts
09-15-77	27	Filed JUDGMENT Now, on motion of Greco & Faraldo, the unconsolidated laws of the State of NY are declared to be unconstitutional in that it permits the State to irreparable (sic) sanction a harness race horse trainer without a pre-suspension or a promt post-suspension hearin (sic) in violation of pltf right to due process and it prohibits stays etc., defts are enjoined from enforcing said statute and that the fifteen (15) day suspension imposed upon pltf. to have commenced on the 7-10-76 has it not been stayed by this Court and is declared to be invalid and nullified—Goettel, J. Judgment Entered on 9015-77 m/n
09-07-77	28	Filed AMENDMENT TO OPINION #46286
09-16-77	29	Filed defts notice of appeal to the USCA for the Second Circuit from the final Order and declaratory judgment entered on 8-9-77 mailed copy to Greco & Faraldo.

Relevant Docket Entries.

DATE	NR.	PROCEEDINGS
09-26-77	30	Filed defts notice of appeal to Supreme Court State of New York from the final judgment entered on 9-15-77. Mailed copy to Greco & Faraldo.
10-13-77	31	Filed stip. and Order that the deft's appeal to the USCA is voluntarily dismissed—Goettel, J.
10-02-77	32	Filed notice of entry of judgment by Greco & Faraldo filed 9-12-77
11-02-77	33	Filed pltf's affdvt. and notice of motion for an order discharging Fidelity and Deposit Co. from all liability on Bond #J9026009 ret. 11-11-77
12-14-77	34	Filed memo. end. on document #32 Motion granted on default—Goettel, J. m/n
12-13-77	35	Filed Order on the motion of pltf. It is Ordered that Fidelity and Deposit Co. of Maryland Be released of all liability on Bond #J9026009—Goettle, J. m/n
03-24-78	36	Filed true copy of USCA statement of jurisdiction (sic) by the Clerk of the Supreme Court
04-07-78	37	Filed Exparte Order transmitting Record to the Supreme Court of the United States—Goettel, J. m/n
04-10-78	38	Filed notice of original record on appeal has been certified and transmitted to USCA for the Second Circuit (sic) on 4-10-78

Amended Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 3070 GLG

JOHN BARCHI,

Plaintiff,

against

BERTRAM D. SARAFAN, as Chairman and JOSEPH H. BOYD, JR., and EUGENE J. KEOGH, as Members of the New York STATE RACING & WAGERING BOARD, Division of Harness Racing, HON. HUGH CAREY, Governor of the State of New York, and HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

Plaintiff, by his attorneys, Greco & Faraldo, for his Amended Complaint, alleges as follows:

FIRST: Jurisdiction of this Court is invoked pursuant to 42 U.S.C. 1983 and 28 U.S.C. 1343 (3) to convene a three judge court pursuant to 28 U.S.C. 2281 et seq. to enjoin the enforcement, operation and execution of Section 8022 of the Unconsolidated Laws of the State of New York and Rule 4105.8 (f) promulgated by the New York State Racing and Wagering Board in furtherance thereof, for Unconstitutionality and pursuant to pendente jurisdiction to enjoin the enforcement, operation and execution of Rules 4120.5, 4120.6 and 4116.11 of the New York State Racing & Wagering Board, also for Unconstitutionality.

COUNT ONE

SECOND: That at all times hereinafter mentioned, plaintiff was and still is a licensed harness racing trainer pursuant to Rule 4101.24 of the New York State Harness Racing Commission of the New York State Racing & Wagering Board.

THIRD: That at all times hereinafter mentioned, defendant, Bertram D. Sarafan was and still is chairman and defendants Joseph H. Boyd, Jr. and Eugene J. Keogh were and still are members of the New York State Racing & Wagering Board, Division of Harness Racing.

FOURTH: That at all times hereinafter mentioned, defendant Carey was and still is the Governor of the State of New York, charged with the administration of the laws of the State.

FIFTH: That at all times hereinafter mentioned, defendant, Lefkowitz, was and still is the attorney general of the State of New York, and as such, is chief legal officer of the State.

SIXTH: That at all times hereinafter mentioned, plaintiff was the trainer of a horse known as "Be Alert", that raced at Monticello Raceway and owned by one Walter Littman.

SEVENTH: That on or about the 22nd day of June, 1976, the said horse known as "Be Alert" ran in the third race at Monticello Raceway and finished second in said race.

EIGHTH: That on or about the 24th day of June, 1976, plaintiff was given notice by John F. Fay, the official Steward-Presiding Judge of the New York State Racing &

Wagering Board appointed to supervise all race meetings at the Monticello Raceway that urine tests had revealed that "Be Alert" had improperly been treated with the drug "Lasix" in violation of Rule 4120.4 of the Rules of the New York State Racing & Wagering Board, that prohibits such treatment to harness racing horse within forty-eight hours of a race.

NINTH: That the investigation of the charge was assigned to Daniel Goldberg, Chief Investigator of the New York State Racing & Wagering Board.

TENTH: That plaintiff did not treat "Be Alert" with Lasix as charged and denied to both John F. Fay and Daniel Goldberg that he had so treated the horse.

ELEVENTH: That on the 28th day of June, 1976, Victor C. Kaufman of New York Lie Detection Laboratories did administer to plaintiff a lie detector test at his own request and made findings that plaintiff had answered all questions truthfully in denying that he had administered Lasix to "Be Alert", a copy of the result of the examination and credentials of the examiner being herein annexed.

TWELFTH: That on the 29th day of June, 1976, the New York State Racing & Wagering Board did have a lie detector test of its own administered to the plaintiff, which, upon information and belief, plaintiff did likewise pass, but declined to furnish plaintiff with a copy thereof.

THIRTEENTH: That effective on the 10th day of July, 1976, defendant, Bertram Sarafan, as Chairman and defendants Joseph H. Boyd, Jr. and Eugene J. Keogh did suspend plaintiff for fifteen days for violation of Rules 4120.5, 4120.6 and 4116.11, by the alleged administration

of Lasix to "Be Alert", without affording plaintiff a hearing, despite the absence of any emergency situation calling for a dispensation of such procedural due process requirement, pursuant to the authority of Section 8022 of the Unconsolidated Laws of the State of New York, which provides as follows:

> "If the State harness racing commission shall refuse to grant a license applied for under this act, or shall revoke or suspend such a license granted by it, or shall impose a monetary fine upon a participant in harness racing the applicant or licensee or party fined may demand, within ten days after notice of the said act of the commission, a hearing before the commission and the commission shall give prompt notice of a time and place for such hearing at which the commission will hear such applicant or licensee or party fined in reference thereto. Pending such hearing and final determination thereon, the action of the commission in refusing to grant or in revoking or suspending a license or in imposing a monetary fine shall remain in full force and effect. The commission may continue such hearing from time to time for the convenience of the parties. Any of the parties affected by such hearing may be represented by counsel, and the commission may be represented by the attorney-general, a deputy attorney general or its counsel. In the conduct of such hearing the commission shall not be bound by technical rules of evidence, but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. In connection with such hearing, each member of the commission shall have the power to administer oaths and examine witnesses, and may issue subpoenas to compel attendance of witness, and the production of all material and relevant reports, books, papers, documents, correspondence and other evidence. The commission may, if occasion shall require, by order, refer to one or more of its members or officers, the duty of taking testimony in such matter, and to report thereon to the commission, but no determination shall be made therein except by the commission. Within thirty days after the conclusion of such hearing, the commission shall make a final order in writing, setting forth the reasons for the action taken by it and a licensee or party fined, as the case may be. The action of the commission in refusing to grant a license or in revoking or suspending a license or in imposing a monetary fine shall be reviewable in the Supreme Court in the manner provided by the provisions of article seventy-eight of the civil practice law and rules."

THIRTEENTH: That plaintiff has suffered irreparable damage by the fifteen day suspension, which deprives him of continuity of his occupation as a trainer for the various owners of harness race horses, that require continuous care, thereby endangering his business relationship with said owners, who will be obliged to seek out other trainers; that in addition, plaintiff has suffered irreparable damage by reason of the potential loss of income during the fifteen day period that could amount to as high as five to ten thousand dollars and which cannot be made up, by reason of the harness races for which he will be ineligible.

FOURTEENTH: That the administrative appellate remedy the commission provided by Section 8022 of the New York State Unconsolidated Laws and Rule 4121.5 is inadequate, in that Section 8022 provides that "pending such hearing and final determination thereon, the action of the commis-

sion . . . in revoking or suspending a license . . . shall remain in full force and effect" and the administrative appeal will not come on to be heard until far beyond the fifteen day suspension period, thereby precluding any possibility of meaningful administrative review or relief for the plaintiff.

FIFTEENTH: That section 8022 of the New York State Unconsolidated Laws is Unconstitutional in violation of the Fourteenth Amendment and 42 U.S.C. 1983 in that defendants Bertram D. Sarafan as Chairman and Joseph H. Boyd, Jr. and Eugene J. Keogh, acting under color of the laws of the State of New York, have deprived plaintiff of his Constitutional right to opportunity for a hearing prior to the imposition of administrative punishment, absent an emergency situation.

SIXTEENTH: That as a result of the premises, plaintiff is entitled to judgment against defendants enjoining the enforcement and execution of Section 8022 of the Unconsolidated Laws of the State of New York and Rule 4105.8(f) promulgated in furtherance thereof and for a declaration of their invalidity as violative of due process of law secured by the Fourteenth Amendment, pursuant to 28 U.S.C. 2281. Rule 4105.8 authorizing summary punishment, providing as follows:

> "It shall be the duty of the (harness racing) judges to
>
> . . . . (f) Where a violation of any rule is suspected to conduct an inquiry promptly and to take such action as may be appropriate and render their report to the commission. Any action as a result of such inquiry, must be concurred in by at least two of the judges.

COUNT TWO

SEVENTEENTH: Plaintiff repeats, reiterates, and realleges each and every allegation as set forth in paragraphs "Second" through "Fifteenth" of his first cause of action with the same force and effect, as if fully set forth herein.

EIGHTEENTH: That defendants, Bertram D. Sarafan, as Chairman and Joseph H. Boyd, Jr. and Eugene J. Keogh, as Members of the New York State Racing & Wagering Board, Division of Harness Racing, have "general jurisdiction" over flats racing, harness racing and quarter racing, by virtue of Section 7951-a of the Unconsolidated Laws of the State of New York, which provides as follows:

> "The regulatory agency having general jurisdiction under this act (the pari-mutuel revenue law) and all acts amendatory or supplemental hereto shall be the New York state racing and wagering board as established by article eight of this act. The board shall have all powers, functions and duties heretofore conferred by this act upon the state racing commission, the state harness racing commission or the state quarter horse racing commission and all references herein to such commissions shall be construed to refer to the board. Such commissions shall be continued as reconstituted by section two hundred three of article eight and shall have only the powers, functions and duties therein prescribed."

NINETEENTH: That by virtue of Section 7915 of the Consolidated Laws of the State of New York, licensees of defendants Bertram D. Sarafan, as chairman, and Joseph H. Boyd, Jr. and Eugene J. Keogh as Members of the New York State Racing & Wagering Board, Division of Harness Racing, that are licensed for thoroughbred racing, are not

prohibited a stay of revocation or suspension pending an administrative hearing of the charges, as prohibited by Secton 8022 of the Consolidated Laws of the State of New York, for licensees for harness racing, as set forth in paragraphs "Twelfth" and "Fourteenth" herein, the applicable provision of Section 7915 being as follows:

> "No license shall be revoked unless such revocation is at a meeting of the state racing commission on notice to the licensees who shall be entitled to a hearing in respect of such revocation. In the conduct of such the commission shall not be bound by technical rules of evidence but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. The action of the commission in refusing, suspending or in revoking a license shall be reviewable in the supreme court in the manner provided by the provisions of article seventy-eight of the civil practice law and rules. Such hearing may be held by the chairman thereof or by any commissioner designated by him in writing, and the chairman or said commissioner shall issue subpoenas for witnesses and administer oaths to witnesses. The chairman or commissioner holding such hearing shall, at the conclusion thereof, make his findings with respect thereto and said findings, if concurred in by two members of the commission, shall become the finding and determination of the commission."

that as a result of the premises, two classes are thereby impermissibly created for the discipline of horse racing licensees.

TWENTIETH: That the New York State Legislature has thereby created a discriminatory procedural plan for the

imposition of penalties against licensees of thoroughbred and harness racing personnel, the practical effect being that revocation or suspension penalties upon thoroughbred racing licensees is not effective until an administrative hearing be conducted while harness racing licensees are subjected to such revocation or suspension, without a prior administrative hearing, both of which racing activities are under the jurisdiction of New York State Racing & Wagering Board, thereby impermissibly creating two classes for disciplinary treatment, in violation of Equal Protection of Law secured by the Fourteenth Amendment.

TWENTY-FIRST: That there is no compelling state interest for the discriminatory machinery legislatively established for the treatment of violations by thoroughbred and harness racing personnel and for the said creation of two classes for disciplinary purposes.

TWENTY-SECOND: That as a result of the premises, plaintiff is entitled to judgment against defendants enjoining the enforcement and execution of Section 8022 of the Unconsolidated Laws of the State of New York and Rule 4105.8(f) promulgated in furtherance thereof and for a declaration of their invalidity as violative of Equal Protection of Law, secured by the Fourteenth Amendment, by reason of the inadequacy of the administrative appellate remedy for harness racing discipline proceedings, as distinguished from the opportunity for an administrative hearing of charges in connection with thoroughbred racing discipline proceedings prior to the imposition of punishment, as hereinbefore set forth, pursuant to 28 U.S.C. 2281.

COUNT THREE

TWENTY-THIRD: Plaintiff repeats, reiterates and realleges each and every allegation as set forth in paragraphs

"Seventeenth" through "Twenty-second" of his second cause of action with the same force and effect as if fully set forth herein.

TWENTY-FOURTH: That the investigation made by Daniel Goldberg, Chief Investigator of the New York State Racing and Wagering Board failed to uncover any evidence that plaintiff had administered the drug Lasix to the harness race horse, "Be Alert" within the prohibited 48 hour period prior to the race, but instead of evidence, defendants did rely upon the presumption created by Rules 4120.5, 4120.6 and 4116.11 of the New York State Racing and Wagering Board which provide as follows:

"4120.5 Presumptions. Whenever the test or tests prescribed in section 4120.1 hereof disclose the presence in any horse of any drug, stimulant, depressant or sedative, in any amount whatsoever it shall be presumed:

(a) that the same was administered by a person or persons having the control and/or care and/or custody of such horse with the intent thereby to affect the speed or condition of such horse and the result of the race in which it participated;

(b) that it was administered within the period prohibited by subdivision (d) of Section 4120.4 of this part, and

(d) that a sufficient quantity was administered to affect the speed or condition of such animal."

"4120.6 Trainers' responsibility. A trainer shall be responsible for the condition of all horses trained by him. No trainer shall start a horse or permit a horse in his custody to be started if he knows or if by exercise of reasonable care he might have known or

have cause to believe that the horse has received any drug, stimulant, sedative, depressant, medicine or other substance that could result in a positive test. Every trainer must guard or cause to be guarded each horse trained by him in such manner and for such period of time prior to racing the horse so to prevent any person not employed by or connected with the owner or trainer from administering any drug, stimulant, sedative, depressant, or other substance resulting in a positive test."

"4116.11. Trainer's responsibility. A trainer is responsible for the condition, fitness, equipment and soundness of each horse at the time it is declared to race and thereafter when it starts in a race."

TWENTY-FIFTH: That the administratively created presumption that the unlawful drugging of a harness race horse creates a presumption that it was done by the trainer violates due process of law secured by the Fourteenth Amendment in that there is no rational connection between the fact proved, that the horse was illegally drugged, and the ultimate fact presumed that the trainer is guilty of the act or carelessly guarded against the act occurring, in that it is impossible for any person to stand guard over a horse uninterruptedly for twenty-four hours a day and there are many other persons, aside from the trainer, who have access to the horse, including but not limited to, grooms, owners, State officials, security personnel and members of the public, who might stealthfully gain access, with an interest in the outcome of the race, thereby entitling plaintiff to an injunction, prohibiting State reliance upon the presumptions created by Rules 4120.5, 4120.6 and 4116.11 of the New York State Racing & Wagering Board, and requiring the presentation of evidence of guilt, before administrative infliction of punishment.

Amended Complaint.

WHEREFORE, plaintiff demands judgment against defendants enjoining enforcement, operation and execution of Section 8022 of the Unconsolidated Laws of the State of New York and Rule 4105.8 (f) promulgated by the New York State Racing & Wagering Board in furtherance thereof and Rules 4120.5, 4120.6 and 4116.11 of the New York State Racing & Wagering Board and for a declaration of their invalidity and for an order nullifying the fifteen day suspension imposed upon plaintiff commencng on the 10th day of July, 1976 and for the appointment of a three judge court pursuant to the provisions of 28 U.S.C.A. 2281 et seq., together with the costs and disbursements and for such other and further relief as to this Court may be deemed just and proper.

BY: .....
Member of the Firm
GRECO & FARALDO
Attorneys for Plaintiff
Office & P.O. Address
125-10 Queens Boulevard
Kew Gardens, New York 11415
212-544-6800

Amended Complaint.

17 BATTERY PLACE—SUITE 1925
NEW YORK, N. Y. 10004

212-267-3838

SUBMITTED TO: Greco and Feraldo Esqs.
125-10 Queens Blvd
Kew Gardens, Queens, N.Y. 11415

CONFIDENTIAL ATTENTION: Joseph Feraldo Esq.

RE: John Barchi (Name of Subject) — June 28, 1976 (Date)

ARRANGEMENTS: The above named subject, was given a Polygraph Examination for the purpose of determining the truthfulness of the answers to the following questions.

Subject signed statements releasing all parties concerned and empowering this examiner to disclose to those in authority his opinions, as well as information elicited during said test.

PROCEDURE: A four pen Stoelting Polygraph was utilized to register changes in blood-pressure, rate and strength of pulse beat, galvanic skin response, and the respiratory pattern.

The following relevant questions were asked and the indicated answers given:

Do you intend to answer all questions on this test truthfully? YES

Amended Complaint.

Did you ever give Be Alert Laszix? No

Do you know of anyone ever giving Be Alert Laszix? No

Did you ever direct anyone to give Be Alert Laszix? No

Did you ever authorize anyone to give Be Alert Laszix? No

Was Be Alert treated wtih Anaprine on June 20, 1976 by Dr. Sadowsky? Yes

Have you lied to me on this test? No

Do you honestly believe you passed this test? Yes

POLYGRAPHIST'S OPINION: No deception was indicated in this subject's recorded responses to the above relevant questions and it is this polygraphist's opinion that he answered all these questions truthfully.

VICTOR C. KAUFMAN
Victor C. Kaufman
Polygraphist

This information is confidential and improper use thereof could subject the recipient to a possible court action.

Answer.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 3070
(G.L.G.)

JOHN BARCHI,

Plaintiff,

against

BERTRAM D. SARAFAN, et al.,

Defendants.

Defendants, for their answer to the amended complaint herein, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New oYrk, respectfully allege:

1. Deny each and every allegation contained in paragraphs "Fourteenth", "Fifteenth", "Sixteenth", "Twentieth", "Twenty-first", "Twenty-second" and "Twenty-fifth", thereof.

2. Deny each and every allegation contained in paragraph thereof designated "Thirteenth", except admit that plaintiff was suspended for a period of fifteen days pursuant to N.Y. Unconsolidated Laws § 8022 for violation of 9 N.Y.C.R.R. §§ 4120.5, 4120.6 and 4116.11.

3. Deny knowledge or information sufficient to form a belief as to so much of paragraph "Tenth" thereof as alleges that plaintiff did not treat the horse "Be Alert" with Lasix.

4. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in the second paragraph thereof designated "Thirteenth".

Answer.

5. On information and belief, admit paragraph "Eleventh" thereof.

6. Respectfully refer the Court to the official texts of the statutes and regulations referred to therein for their content.

AS AND FOR A FIRST, SEPARATE AND COMPLETE DEFENSE

7. The complaint fails to state a claim within the jurisdiction of the Court.

AS AND FOR A SECOND, SEPARATE AND COMPLETE DEFENSE

8. The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, it is respectfully requested that the complaint be dismissed.

Dated: New York, New York
August 2, 1970

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
By

ROBERT S. HAMMER
Assistant Attorney General
Attorney for Defendants
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3394

Order to Show Cause, July 12, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

To Convene 3 Judge Court etc.

76 Civ 3070 GLG

JOHN BARCHI,

Plaintiff,

against

BERTRAM D. SARAFAN, as Chairman and JOSEPH H. BOYD, JR. and EUGENE J. KEOGH, as Members of the NEW YORK STATE RACING & WAGERING BOARD, Division of Harness Racing, HON. HUGH CAREY, Governor of the State of New York, and HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

Upon reading and filing the annexed affidavit of JOHN BARCHI, sworn to the 12th day of July, 1976, the summons and complaint herein and the Notice of Suspension, Revocation and/or Fine and all of the proceedings heretofore had,

Now, on motion of GRECO & FARALDO, attorneys for the plaintiff, it is hereby ordered, that

The defendants show cause at a Term for Motions to be held in Room 506 before United States District Judge Wm. C. Conner in the Courthouse at Foley Square, New York, New York, on the 20 day of July, 1975, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made and entered (1) temporarily enjoining, staying and prohibiting enforcement of the determination by defendant members of the

Order to Show Cause, July 12, 1976.

New York State Racing and Wagering Board that the trainer's license of plaintiff be suspended for fifteen days and from preventing him from, in any way, performing his duties and responsibilities as a licensed trainer in the State of New York pending determination of this action, and (2) convening a three judge Court pursuant to 28 U.S.C.A. 2281 and 2284 to enjoin enforcement of Section 8022 of the Unconsolidated Laws of the State of New York and Rules 4105.8 in furtherance thereof and 4120.5, 4120.6 and 4116.11 of the New York State Racing & Wagering Board and declaring their invalidity and for such other and further relief as to this Court may be deemed just and proper.

In the meantime, and until the hearing of this motion, defendants, their agents and employees be and they are temporarily restrained and prohibited from enforcing the determination of defendants that the trainer's license of plaintiff be suspended for Fifteen days and from preventing him from performing his duties and responsibilities as a licensed trainer in the State of New York, it is further, ordered that security in the sum of $1,500.00 shall be posted by the plaintiff w/in 48 hrs.

SUFFICIENT CAUSE APPEARING THEREFORE, LET personal service of this order to show cause, supporting papers and the summons and complaint commencing this action be served upon defendants personally by JOSEPH A. FARALDO, Attorney for plaintiff, on or before the 13th day of July, 1976, by 5 P.M., be deemed sufficient.

Dated: New York, New York
July 12, 1976
issued 4:40 P.M.

ROBERT J. WARD
U.S.D.J.

Affidavit of John Barchi, July 12, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN BARCHI,

Plaintiff,

against

BERTRAM D. SARAFAN, as Chairman and JOSEPH H. BOYD, JR. and EUGENE J. KEOGH, as Members of the NEW YORK STATE RACING AND WAGERING BOARD, Division of Harness Racing, HON. HUGH CAREY, Governor of the State of New York and HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendant.

STATE OF NEW YORK
COUNTY OF QUEENS } ss.:

JOHN BARCHI, being duly sworn, deposes and says:

That I am the plaintiff in the within action and submit this affidavit in support of my motion for temporary injunction staying the imposition of a suspension upon me as a harness racing trainer and for the convening of a three judge court pursuant to 28 U.S.C.A. 2281 and 2284 to enjoin enforcement of Section 8022 of the Unconsolidated Laws of the State of New York and Rules 4105.8, 4120.5, 4120.6 and 4116.11 of the New York State Racing and Wagering Board and to declare them unconstitutional.

Plaintiff is a harness racing trainer, licensed by the New York State Racing & Wagering Board and trains horses at Monticello Raceway. Among the horses trained by him is "Be Alert", which is owned by one Walter Littman.

Affidavit of John Barchi, July 12, 1976.

On the 22nd day of June, 1976, "Be Alert" participated in the third race at Monticello Race Track and placed second. Two days later, on the 24th day of June, 1976, plaintiff was summoned to the office of John F. Fay, the official Steward-Presiding Judge appointed by the New York State Racing and Wagering Board to supervise all race meetings at the Monticello Raceway and given notice that urine tests had revealed the horse had improperly been treated with the drug "Lasix," in violation of Rule 4120.4 of the Rules of the State of New York Racing and Wagering Board, that prohibits such treatment to a harness racing horse within forty-eight hours of a race. Plaintiff was interrogated by Mr. Fay and denied any complicity or knowledge of such occurrence. The investigation of the charge was assigned to Daniel Goldberg, the Chief Investigator of the Board.

"Lasix" is a drug used to clear the sinus cavity of a horse and if administered shortly before a race, it will increase his endurance and therefore, his performance.

Plaintiff was never confronted with the urine specimen, nor the circumstances under which it was taken. The latter information is extremely important, in that often, these specimens are drawn from a number of horses and the possibility of a mixup in labeling is present.

Section 8022 of the Unconsolidated Laws of the State of New York* authorizes the imposition of punishment upon a licensed trainer, without a hearing as follows:

• • •

Therefore, in an effort to convince the Board that plaintiff is not guilty of the charge, he voluntarily underwent a lie detector test on the 28th day of June, 1976, by Victor C. Kaufman of New York Lie Detection Laboratories, who was hired by him, with a resulting conclusion by the examiner that he was truthful when he denied complicity in the drugging incident, a copy of the report and credentials

* Quoted at pages 8a-9a, *supra*.

Affidavit of John Barchi, July 12, 1976.

of the examiner being annexed to the complaint herein. The following day, on June 29th, 1976, defendant BOARD members had him undergo a second lie detector test, which he was informed he passed. However, he was not provided with a copy.

The Rules of the Board 4120.5, 4120.6 and 4116.11 provide* that from the fact that a harness racing horse has been drugged, it can be presumed that it was done by the trainer or he negligently failed to guard against such occurrence. The Rules read as follows:

• • •

Relying upon these administrative presumptions, effective July 10th, 1976, defendants members of the BOARD suspended plaintiff for fifteen days for violation of the aforesaid rules by the alleged administration of Lasix to "BE ALERT". Plaintff was not afforded any type of hearing prior to the imposition of punishment.

A suspension of this type can cost a trainer his clientele of owners for whom he trains horses. The owners are required to hire new trainers, since it is self-evident that there can be no hiatus in the care of a horse. This may very well result in the owner not returning to the suspended trainer after the suspension is over. Moreover, the trainer is deprived of his livelihood during the period of suspension, which can well result in a five or ten thousand dollar loss. The bulk of the income of trainers often depends upon racing events and therefore, is sporadic. It is therefore clear that such suspension can result in irreparable damage for which there is no remedy at law, by reason of possible loss of owners and income that can never be made up.

Section 8002 of the Unconsolidated Laws provides an administrative appellate remedy to the Commission, but which is entirely inadequate because of the statute pro-

* Quoted at pages 14a-15a, *supra*.

hibits a temporary stay of penalty, providing that "pending such hearing and final determination thereon, the action of the commission . . . in revoking or suspending a license . . . shall remain in full force and effect." In this case, it is not possible for the administrative appeal to be heard before the fifteen day suspension is completed. Therefore, plaintiff is effectively deprived of any administrative remedy and therefore, there is none for him to exhaust.

28 U.S.C.A. 2281 authorizes an injunction against enforcement of a State statute by a three judge court, as follows:

• • •

28 U.S.C.A. 2284 authorizes a temporary injunction to prevent irreparable damage:

• • •

Section 8022 of the Unconsolidated Laws of the State of New York is unconstitutional in that it authorizes administrative punishment depriving a person of his livelihood, without hearing. Although such type ex parte administrative action has been upheld in certain specific instances, it has always been required that the agency make a showing of an emergency situation and adequate review provisions before such procedure can be given judicial approval. In the case at bar, no emergency can be shown to dispense with the Constitutional requirement of hearing to precede punishment. Nor is the administrative appeal process adequate. As pointed out, the loss of income the suspension is in effect can never be received, (sic) should the administrative appeal turn favorably toward the trainer. And the danger of the loss of his clientele by reason of the suspension requires sensitive hearing procedures before such drastic punishment can be imposed, with its far reaching consequences to his right to earn a livelihood.

In the case at bar, a three judge court should be convened to enjoin operation of Section 8022. Moreover, the status quo should be preserved by a temporary injunction and restraining order against the imposition of the suspension. On the issue of balancing, defendants will not suffer at all by the delay in the commencement of the punishment should defendants ultimately prevail in this action. But plaintiff will be irreparably and irretrievably damaged, not only by loss of income from the deprivation of his right to engage in his occupation, but loss of clientele that may never return.

Of course, there is no possibility that this action can ever become moot, in view of the continuous danger that plaintiff faces to his livelihood by reason of the Unconstitutional procedures of the Board.

It is also significant that the Rules of the Board allowing an inference to be drawn that the trainer is guilty of drugging a horse in his charge or of negligence resulting in such drugging is constitutionally impermissible from the mere fact that the horse has been drugged. It is not possible for a trainer to guard a horse twenty-four hours a day. Grooms, owners, State officials, security personnel and race track personnel have the same access to the horses as does the trainer. Moreover, a member of the public, bent upon drugging a horse on whom he has wagered, can always gain access to the stall. The evidentiary shortcut established by administrative fiat is Constitutionally unacceptable, where it can result in the loss of livelihood in a Constitutionally protected occupation.

In view of the need for speed in service of these papers, including summons and complaint provision should be made for service by deponent, including process, in view of the administrative delay where service is made by the United States Marshall.

Affidavit of John Barchi, July 12, 1976.

That no prior application has been made to any Court or Judge for this relief.

WHEREFORE, plaintiff demands an order (1) temporarily enjoining, staying and prohibiting the enforecement of the determination by the defendant members of the New York State Racing and Wagering Board that the trainer's license of plaintiff be suspended for fifteen days and from preventing him from, in any way, performing his duties and responsibilities as a licensed trainer in the State of New York, pending determination of this action and (2) convening a three judge Court pursuant to 28 U.S.C. 2281 and 2284 to enjoin enforcement of Section 8022 of the Unconsolidated Laws of the State of New York and Rule 4105.8 in furtherance thereof and 4120.5 and 4120.6 and 4116.11 of the New York State Racing & Wagering Board, and declaring their invalidity and for such other and further relief as to this Court may be deemed just and proper.

(Sworn to by John Barchi this 12 day of July 1976.)

Affidavit of John Barchi, July 12, 1976.

NEW YORK STATE RACING AND WAGERING BOARD
DIVISION OF HARNESS RACING
TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047

NOTICE No. NR#126

NOTICE OF SUSPENSION, REVOCATION AND/OR FINE

7/8/76

John Barchi (Name of Person)	Trainer-Driver (Licensed as)
Westbury, LI, New York (City and State)	997 (New York State Harness Racing License Number)
Dob 4/10/43 (Social Security Number)	Monticello Raceway (Place of occurrence)
	6/22/76 (Date of occurrence)

You are hereby notified that You and all horses owned and/or trained by you are suspended for 15 days 7/10/76 thru 7/24/76. You are eligible to drive on July 25, 1976. Rule invoked: (If more than one so state) (Briefly Explain Reasons) 4120 Sections 5 and 6—Trainer's responsibility rule—in that the horse Be Alert while under your care and training, raced in the 3rd race at Monticello Raceway on June 22, 1976, from which a urine sample was taken and the drug Lasix was found in the horse's system.

FOR MAIN OFFICE USE

Date Paid .....
Fine Recepit No. .....
Entered By .....

JOHN F. FAY
(Signature)
John F. Fay, Presiding Judge-Steward
(Official Title)

Supplemental Affidavit of Joseph Faraldo, July 19, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 CIV 3070 GLG

JOHN BARCHI,

Plaintiff,

against

BERTRAM D. SARAFAN, as Chairman and JOSEPH H. BOYD, JR., and EUGENE J. KEOGH, as Members of the New York STATE RACING & WAGERING BOARD, Division of Harness Racing, HON. HUGH CAREY, Governor of the State of New York, and HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

JOSEPH FARALDO, being duly sworn, deposes and says:

That he respectfully submits this Supplemental Affidavit in support of plaintiff's motion for a temporary stay of injunction prohibiting enforcement of Section 8022 of the Unconsolidated Laws of the State of New York and related administrative rules and regulations contained in this action, for a three-judge court to permanently enjoin operation of the statute.

I have represented numerous trainers, thoroughbred and harness racing charged with violation of the rules of the NEW YORK STATE RACING & WAGERING BOARD. In respect to harness race trainers, license suspension or revocation is

never stayed pending an administrative hearing since such stay is prohibited by Section 8022. However, Section 7915 of the Unconsolidated Laws of the State of New York that pertains to thoroughbred trainers does not prohibit a stay of punishment pending a hearing and, therefore, such stay is often granted.

Thus, the New York statutory scheme has created two distinct classes for the purpose of imposing punishment. Harness racing trainers must commence service of their punishment before the opportunity of a hearing. Thoroughbred trainers often receive a stay and punishment does not commence until after a hearing.

There is no state need for such differential in the procedural due process treatment for the two classes. The distinction violates the Equal Protection of the Law doctrine of the Fourteenth Amendment and for this additional reason, Section 8022 is unconstitutional.

s/ JOSEPH A. FARALDO

(Sworn to the 19th day of July, 1976.)

Affidavit of John M. Dailey, August 26, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 3070 GLG

JOHN BARCHI,

Plaintiff,

against

BERTRAM D. SARAFAN, as Chairman, etc., et al.,

Defendants.

76 Civ. 3698 GLG

REJEAN DAIGNEAULT,*

Plaintiff,

against

BERTRAM D. SARAFAN, as Chairman, etc., et al.,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JOHN M. DAILEY, being duly sworn, deposes and says:

I am Counsel to the New York State Racing and Wagering Board and am its Supervising Steward. I have been

* The *Daignault* case, raising issues similar to those in *Barchi*, was filed after August 12, 1976, the effective date of Public Law 94-381, which repealed 28 U.S.C. §§ 2281 and 2284, and was therefore not referred to a three-judge district court. However, defendants submitted a single affidavit in support of their motion to dismiss in both cases. Judgment was subsequently awarded to Daignault on the authority of the *Barchi* decision. An appeal was taken to the United States Court of Appeals for the Second Circuit, docket number 77-8474, which has been held in abeyance pending final disposition of the *Barchi* case by this Court. Material peculiar to the *Daignault* case has been omitted in this appendix.

with the Board in those capacities since 1974. As Supervising Steward, I am responsible for all racing officials in the State. From 1960 to 1970 I was Assistant Counsel to the former Harness Racing Commission. Prior to my association with the State, I trained and drove harness horses for seven years. I am fully familiar with the facts of these two cases and I make this affidavit in opposition to Plaintiffs' respective motions. The facts set forth herein are stated on the basis of public records, Board records and my conversations with track officials.

I.

Plaintiff Daigneault was suspended for fifteen days following a determination by the judges at Yonkers Raceway that he had violated Rule 4117.4(p) "driving with indifference or lack of effort".

• • •

In Barchi's case, an unsuccessful attempt had been made to determine the actual party responsible for drugging his horse. When this proved impossible, Barchi was suspended on the basis of his trainer's responsibility.

In both cases, immediate action was necessary in the view of the respective judges to protect the integrity and reputation of the sport and to insure public confidence. Historically both the tracks and the State authorities have found it imperative that harness racing be conducted fairly both in fact and in appearance. In the past, even the appearance of impropriety has resulted in disorders at the track and jeopardy to the safety of members of the public and the industry.

II.

Both plaintiffs allege that they are being treated more severely than would be the case of thoroughbred racing.

This is not the fact. Although the regulatory statutes are worded differently, the Board has always interpreted them both to authorize it in its discretion to defer or suspend any penalty imposed by track judges pending administrative review. In the instant cases, Daigneault was offered a hearing within 48 hours and refused it. Barchi never asked for a hearing and went directly to court. In practice, penalties assessed against both jockeys and harness drivers are not stayed, *ab initio*. However, where no stay is given, a prompt hearing is always offered. At the conclusion of a hearing, if the hearing officer believes it warranted he can recommend to the Board that a penalty be suspended until the minutes of the hearing are transcribed and placed before the Board for more thorough consideration. Thus an adequate, meaningful administrative remedy was available to both plaintiffs. Any doubts about this or as to the proper interpretation of the State statutes and regulations should be the subject of abstention in favor of the State courts.

III.

Apart from the fact that thoroughbred, harness and quarter horse racing are governed by different sets of laws and regulations, and historical differences that the Board intends to eliminate wherever possible, there are factual differences in "flat" and "harness" racing that results in different treatment of the two forms. In harness racing, medication is prohibited within 48 hours of a race. This is possible since at Monticello, for example, horses are entered three days in advance of a race. In flat racing, at Aqueduct and Belmont, entries are made only one day prior to the race. In harness racing, the horses for all of the day's racing are brought into the paddock, which is a secure area under State supervision, prior to the start of the first race. There

the horses "warm up", something that is necessary because of the "unnatural" gait of a trotter or pacer. At the same time, pre-race tests are performed to determine if a horse has been drugged. Thoroughbreds are too skittish to be kept in a paddock with other horses except immediately prior to the race in which they are to compete. Pre-race testing has never been deemed feasible by the thoroughbred industry. While it is possible for a drug not to be detected by a pre-race test, in harness racing the probabilities are stronger that if a post-race test uncovers drugs in a horse's blood or urine it is the result of an attempted fraud. For this reason, the integrity and reputation of the sport requires more immediate action on the part of track and Board officials where a post-rate positive drug test follows a pre-race negative test.

For the foregoing reasons and for the reasons set forth in Counsel's memorandum of law and upon oral argument, it is respectfully requested that plaintiffs' respective motions be denied and that their complaints be dismissed.

s/ JOHN M. DAILEY

(Sworn to this 26th day of August, 1976.)

Affidavit of Joseph A. Faraldo, filed September 3, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN BARCHI,

Plaintiff,

—against—

BERTRAM D. SARAFAN, as Chairman and JOSEPH H. BOYD, JR., and EUGENE J. KOEGH, as Members of the New York State Racing and Wagering Board, Division of Harness Racing, HON. HUGH CAREY, Governor of the State of New York, and HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

JOSEPH A. FARALDO, being duly sworn, deposes and says:

That I submit this affidavit in reply to the affidavit of John Dailey, counsel to the New York State Racing & Wagering Board.

That the affidavit in opposition submitted by Mr. Dailey admits that the "regulatory statutes are worded differently". However, Mr. Dailey denies that the plaintiff Barchi is being treated differently than his counterpart would be in thoroughbred racing. John Barchi was never given, nor was he offered an opportunity to be heard. What John Barchi received was a Notice of Suspension effective immediately with the so called "right" to file a Notice of Appeal within 10 days. By the time John Barchi would be heard, and in view of the explicit language of § 8022 of the Unconsolidated Laws of the State of New

Affidavit of Joseph A. Faraldo, filed September 3, 1976.

York prohibiting the issuance of the stay to him, the question would be moot, and the irreparable damage done. This type of administrative review alleged to be adequate is totally and completely inadequate. Such treatment of harness racing licensees is the sad norm in this industry. The laws and procedures in question have been insidiously worked to condition those governed to accept the futility of appeal and to take their punishment without being heard. In April of 1976, five (5) trainers were suspended at Monticello Raceway for similar offenses to that of Barchi's. Upon information and belief, no requests for administrative review were made by any of those trainers. The statement that "where no stay is given, a prompt hearing is always afforded" has not been my experience. No adequate, meanful administrative remedy was available to John Barchi, nor the five (5) trainers in April 1976.

While there are factual differences in "flat" and "harness" racing, none of those differences justify a deprivation of procedural due process for one group of licensees and not another. The historical differences between the laws and regulations governing separate parts of the same racing industry must unfortunately be rectified by the court, since they deny equal protection of law to harness racing licensees, and the Board has no intention to rectify same. When the Board, approximately 4 days after the issuance of a temporary restraining order in the Barchi case issues a stay to a thoroughbred trainer, Veitch, for a positive test, without the necessity of his going to court, and then denies the same to Rejean Daigneault, two days after oral argument in Barchi, I respectfully submit that the Board has no intention to eliminate what it terms historical differences.

The statement by Mr. Dailey that pre-race testing has never been deemed feasible by the thoroughbred industry

Affidavit of Joseph A. Faraldo, filed September 3, 1976.

is tantamount to an admission that the thoroughbred industry can and does regulate itself and that the New York State Racing and Wagering Board has abdicated its duty vis a vis thoroughbred racing and insisted upon it vis a vis harness racing.

In the instant case, John Barchi's horse, Be Alert, was given a pre-race blood test in the paddock by officials of the New York State Racing and Wagering Board. This test his horse passed. During the three or four hour period that this horse was in the paddock, he was subject to intense security supervised by the State of New York.

I respectfully submit that from this fact the State of New York is as responsible a party if not more so, than they claim John Barchi to be.

For the foregoing reasons it is respectfully requested that the plaintiff have his motion granted.

s/ JOSEPH A. FARALDO

(Sworn to the 1st day of September, 1976.)

Affidavit of Lucien Fontaine, August 17, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 CIV 3070
GLG

JOHN BARCHI,

Plaintiff,

against

BERTRAM D. SARAFAN, as Chairman and JOSEPH H. BOYD, JR., and EUGENE J. KEOGH, as Members of the New York State Racing & Wagering Board, Division of Harness Racing, HON. HUGH CAREY, Governor of the State of New York, and HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

LUCIEN FONTAINE, being duly sworn, deposes and says that:

He resides at 9 Old Forge Lane, Tarrytown, New York.

He is a harness racing driver duly licensed under the laws of the State of New York and the U.S. Trotting Association.

In or about 1962, he was training 23 horses in the State of Pennsylvania, until such time as his license was suspended without a formal hearing for a period of ninety (90) days, of which he served sixty-three (63) days.

He was later informed that he was suspended because a horse that he trained came up "positive" for a prohibited drug and so, under the Pennsylvania Trainer's responsi-

Affidavit of Lucien Fontaine, August 17, 1976.

bility rule, which is almost identical with the present rule of New York State, his liability was a matter of law.

As a direct result of this suspension, he lost charge of nineteen (19) of the twenty-three horses that he trained at that time representing every horse belonging to an owner other than himself.

Your deponent suffered irreparable damage because the best stable of horses he ever had was disbanded and the considerable financial benefits of that stable were lost forever along with the years spent in building and training that stable of horses.

Because of this experience and continuation of this onerous rule, your deponent to this date has not and will never train a horse and subject his welfare and that of his family to the vulnerability of such an unreasonable and arbitrary rule.

In 1975, your deponent served a five days suspension and filed a notice of appeal in a matter concerning an alleged driving infraction. After being so penalized without a hearing, your deponent was eventually exonerated.

Your deponent was never compensated for the five lost days.

s/ LUCIEN FONTAINE

(Sworn to the 17th day of August, 1976.)

Opinion of Goettel, J. Convening Three-Judge District Court.

Reproduced in the jurisdictional statement at page 23a.

Opinion of Three-Judge District Court.

Reproduced in the jurisdictional statement at page 3a.

Final Judgment Appealed From.

Reproduced in the jurisdictional statement at page 1a.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, et al.,

Appellants,

-against-

JOHN BARCHI,

Appellee.

On Appeal from the United States District Court
For the Southern District of New York

MOTION TO AFFIRM JUDGMENT

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MOTION TO AFFIRM JUDGMENT

Appellee moves pursuant to Rule 16(c) to affirm the judgment of the United States District Court for the Southern District of New York entered September 15, 1977 enjoining the enforcement of Section 8022 of the Unconsolidated Laws of the State of New York, as repugnant to the due process and equal protection clauses of the Fourteenth Amendment and submits this motion to affirm the judgment on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINIONS AND JUDGMENT BELOW

The opinion of the three judge District Court for the Southern District of New York is reported at 436 F.Supp. 775 and is reproduced in the appellants' appendix beginning page 3a. The judgment appealed from is

reproduced beginning at page 1a of the appendix. The opinion of the District Court granting appellee's motion to convene a three-judge court is not yet reported. It is reproduced beginning at page 23a of appellant's appendix.

JURISDICTION

The jurisdiction of this Court to affirm the judgment below is conferred by Rule 16(c) of the Supreme Court rules.

QUESTIONS PRESENTED

1. Does a state statute providing for summary suspension of the license of a racing ineustry licensee, pending hearing and determination of disciplinary charges, deny such licensee due process of law by summary deprivation of his right to earn a livelihood?

2. Does such state statute violate equal protection of law, where only a certain class of licensees are disqualified from the issuance of an administrative stay, pending determination?

3. Was there any reasonable basis for the federal courts to have abstained from determining this case, where the language of the statute was not uncertain, the practice challenged widespread, the federal question could not be avoided, and the highest state court had vindicated the practice challenged?

4. May an administrative agency be granted summary power to deprive its licensees of their livelihood by virtue of the acceptance of a license issued under color of state law?

STATEMENT OF THE CASE

Appellee is licensed by appellants, who constitute the three members of the New York State Racing & Wagering

Board, to train and drive harness race horses. He earns his livelihood driving and training for harness horse owners, a clientele that he built slowly and laboriously, but which goodwill ties can quickly vanish with any interruption in the continuity of services supplied by him.

The sequence of events that gave rise to this case are succintly set forth in the opinion of the three judge court, included in appellant's appendix (6a):

> " 'Be Alert' is a harness race horse, owned by an uninvolved third party, and trained at the time this suit was brought by the plaintiff. On June 22nd, 'Be Alert' ran in the third race at Monticello Raceway and placed second. Two days later plaintiff was informed by the presiding steward at Monticello that a post-race urinalysis revealed the presence of 'Lasix' in 'Be Alert's' system. Such treatment of a harness race horse is improper within forty eight hours of a race and violates NYSRWB Rule 4120.4. Barchi declared his innocence in the matter. Thereafter, he was not given access to the analysis, the specimen and was never confronted with the circumstances under which it was taken.
>
> "On June 28th plaintiff voluntarily took a polygraph examination in an effort to establish his non-involvement. The examiner reported that the plaintiff was not lying. A subsequent polygraph examination was administered to plaintiff at the behest of the NYSRWB the next day and the results were similarly exculpatory. Nevertheless, on July 10th, plaintiff received a fifteen-day suspension for violation of the so-called trainer's 'insurer' rule from John Fahey, the presiding steward and judge at Monticello. During the period of his suspension no horse of which he was

the trainer would be allowed entry in races at the track."

The drastic consequences of the suspension were outlined by the three judge court, appellant's appendix (7a):

> "Race horse trainers may be entrusted with the care of a number of trotters at any given time. A trainer's income is derived in large measure from the proceeds of horse races (as opposed to a salary), and, since, harness 'meetings' are sporadic, trainers cannot recapture the racing opportunities lost by missed meetings. Once a trainer is suspended, even for a brief period, an owner will immediately seek the services of another trainer so that the horse is not barred from racing. This change is often permanent in order to avoid further disruption in the care of the animal. Significantly, plaintiff has proffered the affidavit of a third-party trainer/driver who experienced such a loss during a suspension for a similar drug infraction. He had also suffered irreparable damage for a subsequent *ex parte* suspension that was later reversed. Racing opportunities lost because of a suspension cannot be recovered by a later reversal in a review hearing for obvious reasons. Furthermore, defendants do not dispute the fact that a loss of horses in a trainer's stable occasioned during his suspension can often be an irremediable injury, even though such suspension is erroneous and without justification."

The balance of the history of this case in the District Court is depicted in appellant's jurisdictional statement. On July 13th, 1976, a District Court judge issued a temporary restraining order, as an incident to this action, enjoining the Board from further execution of the suspension. A three judge court was subsequently convened. In recognition of the clear cut deprivation of the Constitutional right of licensees of the NYSRWB to earn a livelihood at their chosen occupations, without the basic due process safeguard of the right to a prior hearing on the charges to justify such drastic state action, the three judge court below declared Section 8022 of the Unconsolidated Laws of the State of New York unconstitutional to the extent that it sanctions suspension of a licensee, without prior or meaningful administrative review by a hearing.

Appellants served and filed notice of appeal to this Court and a jurisdictional statement, which is now challenged by appellee on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

THE QUESTIONS PRESENTED BY APPELLANTS ARE LACKING OF SUBSTANCE

A.

Based upon the prior decisions of this Court, the within appeal is insubstantial and obviously without merit. This Court has long ruled that the right to procedural due process applies to a broad spectrum of important private and governmentally created interests. *Education. Vlandis v. Kline*, 412 U.S. 441 (1973); *Goss v. Lopez*, 419 U.S. 565 (1975); *Parole. Morrissey v. Brewer*, 408 U.S. 471 (1972); *Child Custody. Stanley v. Illinois*, 405 U.S. 645 (1972); *Driver's License. Bell v. Burson*, 402 U.S. 535 (1971); *Welfare Benefits. Goldberg v. Kelly*, 397 U.S. 254 (1970); *Public Employment. Slochower v. Board of Education*, 350 U.S. 551 (1956).

Generally, due process requires that notice and hearing precede any deprivation of a protected interest. In

the cases cited above, many required a prior hearing even where the deprivation of the protected interest was not as extreme as in the case at bar. The deprivation here being the loss of the right to earn a livelihood. That there are twelve states out of the thirty involved in racing, as appellants argue, that authorize such highhanded and oppressive procedures against racing licensees is an example of the unnecessary and frightening power, improperly delegated to these administrative bodies, which is clearly repugnant to Fourteenth Amendments safeguards.

It seems unthinkable for the promulgation of a statute that authorized executions or suspensions, without proper notice of charges and an opportunity for a meaningful hearing. *In re Ruffalo*, 390 U.S. 544 (1968). In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court made it abundantly clear that welfare benefits may not be cut off, without notice and an opportunity for a prior hearing, holding that the drastic consequences to the recipient, overshadowed the interest of the state in attempting to eliminate fraud in the administration of social welfare laws. It was held that a subsequent hearing was inadequate and not meaningful in view of the irreparable injury and immediate hardship to the welfare beneficiary during the administrative adjudicatory process. That the beneficiary would be entitled to retroactive reimbursementd a subsequent hearing determine that the reasons for cutting off his benefits were without merit, was held insufficient to justify summary termination of benefits. *Arnett v. Kennedy*, 416 U.S. 134 (1974), at first glance seemed to uphold summary suspension prior to an administrative trial. This Court upheld the provisions of the Lloyd-LaFollette Act, authorizing discharge of a federal civil service employee, prior to an administrative hearing, since there was no danger of irreparable damage, should the employee prevail at the subsequently conducted trial type hearing. It was held that if the summary suspension was without basis, the

employee would be reinstated, together with full back pay. His injury, unlike the welfare recipient in *Goldberg*, removed from the social welfare rolls, was not irreparable during the period prior to the adjudicatory phase of his case. It is submitted that were the New York statutory provisions to authorize summary punishment where there is no danger of irreparable injury, it would pass Constitutional muster. Thus, as appellant points out, the United States Court of Appeals in *Ruane v. New York State Racing and Wagering Board*, 532 F.2d 860 (2d Cir. 1976), held that the claim of a jockey fined $250.00 for refusing to fulfill his riding engagement for failure to afford him a prior hearing was frivolous since a subsequent hearing was available, as well as remission of the penalty should he prevail. There was no danger of irreparable injury present. However, in the case at bar, the more drastic punishment of revocation or suspension is at stake with its irremediable consequences.

The trainer who is suspended will invariably suffer irreparable injury. The owners of the horses in his care must look to other trainers to provide the continuous attention the horses require and to avoid the loss of racing opportunities. The change is often permanent and the appellee is never made whole again even if vindicated in the ultimate hearing. The income lost during the period of his suspension is lost forever. His clientele laboriously compiled over a period of years are gone forever, and his business totally destroyed by the suspension. The argument for a prior hearing in the case at bar is even more compelling in the case at bar than in *Goldberg*. For even in *Goldberg*, a welfare beneficiary removed from the rolls, temporary hardship irrespective, can be compensated by a payment of benefits cut off if ultimately vindicated; not so here. In view of these consequences, the scale of conscience, as well as due process, requires that a hearing precede suspension, so that no mistakes are made. Indeed, it is

distasteful for a state administrative agency to show such lack of concern for individual rights, and insist upon clinging to secret proceedings and summary power to ruin the innocent along with the guilty, in the name of the public interest. There is an inherent revulsion against such a system which provides secret proceedings and favors quick sanctions even in the face of a demonstration of innocence.

To compare *Montayne v. Haymes*, 427 U.S. 236 (1976) and *Meachum v. Fano*, 427 U.S. 215 (1976), where this Court declined to interfere with the internal management of prisons and to require a hearing to precede a prison transfer, demonstrates a total lack of understanding of the nature of the right involved in the case at bar. A prisoner does not enjoy a Constitutional right to select his place of incarceration. Appellee, however, does have a Constitutional right to freedom from unreasonable interference with his right to earn a livelihood. The concept of Constitutionally protected liberty includes "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness." *Meyer v. Nebraska*, 262 U.S. 43 (1923).

Appellants misguidedly rely upon *Dixon v. Love*, 431 U.S. 105 (1977), where this Court approved summary suspension of a driver's license based upon statutorily designated frequency of traffic convictions. The court pointed out that the petitioner had been accorded a hearing for each offense for which he had been convicted and which, when added up, became the basis for the loss of his driver's license. Thus, to afford him a further hearing would be of little, if any, value. The only issue was the mathematics, to wit: the number of convictions for the

designated traffic offenses within a fixed period, for which the statute required license suspension. Moreover, the Court took pains to point out that the state legislation safeguarded the livelihood of the driver, by providing for a limited license allowing him to drive in the course of his employment, if necessary to his livelihood. Thus, the court recognized the primacy of the right of the individual to earn his livelihood and sanctioned summary proceedings, in view of the statutory safeguard that the right to drive not be in total suspension, where it is necessary to enable the driver to earn a livelihood.

In *Dixon v. Love*, this Court stressed that in reality, the licensee had been accorded hearings on each offense that went into the accumulation that required suspension of his license:

> "Moreover, the risk of an erroneous deprivation in the absence of a prior hearing is not great. Under the Secretary's regulations, suspension and revocation decisions are largely automatic. . . . In this case appellee had the opportunity for a full judiciary hearing in connection with each of the traffic convictions on which the Secretary's decision was based. Appellee has not challenged the validacy of those convictions or the adequacy of his procedural rights at the time they were determined."

Dixon v. Love, in each measure of its *ratio decendi*, supports the position of appellee. It is difficult to surmise why appellant takes comfort from its teachings.

the possibility of civil and criminal sanctions for abuse, was deemed an adequate safeguard to assure against improper exercise of the right of a teacher to spank a child, without a prior hearing in *Ingraham v. Wright*, 430 U.S. 651 (1977). Contrast that safeguard with the immunity from suit of the Commissioners of the NYSRWB, should it

ultimately be determined that summary suspension was unjustified.

Hubel v. West Virginia Racing Commissioner, 513 F.2d 240 (4th Cir., 1975), to the extent that it approves of summary deprivation of the livelihood of horse racing licensees, should be deemed overruled. To insure public confidence in the integrity of racing is no more justification of the infringement of fundamental due process by suspending licenses prior to a hearing, than would be such procedures for other occupations or citizens, if done in the name of insurance of public confidence in other occupations. The distribution of alcoholic beverages is just as tightly regulated in New York State as horse racing. Yet, such licensees may not be deprived of licenses, without the due process requirement of a prior hearing, public confidence notwithstanding. See, Section 100 et seq., *New York State Alcoholic Beverage Control Law*. Indeed, public confidence must be maintained in all professions and occupations. However, the price of summary deprivation of a livelihood, predicated on mere accusation, has been deemed to be too drastic and draconian for all other professions, occupations, and citizens.

To rationalize that the remote posibility of a public danger is the *sine qua non* for all summary administrative adjudication is to universally justify ex parte secret proceedings. The dishonest racing trainer is no more dangerous to the public than the mugger, dishonest lawyer or dishonest pharmacist. The latter are afforded a trial, prior to the infliction of sanctions. There is no reason why the former is not entitled to the same considerations, especially where his professional life is at stake. The time is long overdue for such pronouncement to be made for the racing industry.

Therefore, based upon the prior decisions of this Court, the within appeal is insubstantial and obviously without merit. *Ex parte Poresky*, 290 U.S. 30 (1910); *Bailey v. Patterson*, 369 U.S. 31 (1962).

B.

The court below was not only correct in finding that Section 8022 of the Unconsolidated Laws of the State of New York violated the due process of law clause as well, in that Section 7915 of the Unconsolidated Laws of the State of New York does not prohibit stays of execution of suspension, where charges are brought against thoroughbred race horse licensees, while such stays are prohibited by the language of Section 8022, *supra*, for harness racing licensees. Appellants have all but conceded that there is no rational distinction between the two classes of licensees for procedures to be more harsh for one than the other. However, it is the argument of appellants that in spite of the command of Section 8022, *supra*, not to grant any stays of execution of suspension against harness racing licensees, appellants, on their own, often defy the statute and grant such stays.

Section 8022, *supra*, provides, concerning summary suspension of harness racing licensees who demand an administrative hearing, "pending such hearing and final determination thereon, the action of the commission . . . suspending a license . . . shall remain in full force and effect." Appellant has truthfully wasted the valuable judicial time of the court below. On the one hand, it argues that it does not give service to Section 8022, in that it often disregards the plain language of the statute and stays execution of suspension for harness race licensees, despite the statutory prohibition. If this be true, appellants should join in the argument of appellee that the statute is unconstitutional and point to its own claimed refusal to adhere to it, as evidence that it offends equal protection of law safeguards.

In any event, this secondary issue does not really reach the crux of the prime Constitutional issue, which is that no licensee should be deprived of his occupation without a

prior hearing. Whether appellant occasionally grants a stay of suspension to a licensee summarily suspended by a steward is of no Constitutional significance. The point is that no licensee should have to live in the terror that an unfounded charge might well mean the cessation of his livelihood and the destruction of a business that he laboriously built.

C.

There is no basis for the doctrine for abstention to be applied in the case at bar. The New York State Court of Appeals in a relatively recent case, *Tappis v. New York State Racing & Wagering Board, Harness Racing Division*, 36 N.Y.2d 863 (1975), made it crystal clear that the state approves of the statute that singles out licensees in the harness racing industry to be subject to summary suspension, writing:

> "The compelling and substantial state interest involved in maintaining discipline among trainers and owners . . . so as to preclude the appearance or the fact of impropriety, justifies on-the-spot sanctions and penalties in advance of hearings and the procedure . . . followed involved no infringement of petitioner's constitutional rights and complied sufficiently with the requirements of the due process clauses of the Federal and State Constitutions."

Thus, there is no reason to abstain. The highest state court has already pronounced upon the issue. The construction that it has given to Section 8022, *supra*, leaves no escape hatch through which the federal question can be avoided. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *Carey v. Sugar*, 425 U.S. 73 (1976).

Appellant makes reference to *Matter of Gerard v. Barry*, ——A.D.2d—— (2nd Dept., 1977), where the Appellate Division, Second Department, affirmed the order of Nassau County Supreme Court, enjoining the same appellants as in the case at bar, from enforcing a summary suspension of licensee, without a hearing. The Appellate Division affirmed, without opinion, the opinion of Nassau County Justice Velsor, who relied upon the case at bar, in declining to follow the New York Court of Appeals *Tappis* decision, writing as follows:

> "The precise question was presented to a constitutionally organized three-judge Federal Court in the most recent case of *Barchi v. Sarafan* et al (decided August 18, 1977) in the United States District Court for the Southern District of New York. That Court found Section 8022 of the Unconsolidated Laws of New York (applicable to harness racing) unconstituional on two grounds; the first, by parallel reasoning aiplicable to the facts of this case, because a licensed trainer was disciplined without either a pre-suspension hearing, or a prompt post-suspension hearing. I do not find any substantive distinction which would merit consideration in the perception that Barchi, supra, involved harness racing, and the instant case pertains to 'flat' racing. Accordingly, it must be assumed as binding that absent any meaningful difference between revocation and suspension, and between harness racing and 'flat' racing, a disregard or deprivation of procedural due process in affording a licensed employee a hearing with the constitutional safeguards of the right to confront and cross-examine, is an unconstitutional invasion of a citizen's right to due process."

Thus, it is the decision in the case at bar, that has guided state courts on the long delayed route to due process of law.

in this circumscribed area of occupation. It can be now said that state law has been upset as a result of the decision in the case at bar.

Nor are any of the other classic reasons for abstention present in the case at bar. There is no competing action between the parties pending in a state court where appellee would have opportunity to litigate the issue herein, that should impel a federal court to abstain. *Judice v. Vail*, 430 U.S. 327 :1977).

Federal courts have clear cut original jurisdiction to entertain actions brought to vindicate civil rights. *Monroe v. Pape*, 365 U.S. 658 (1961); *Baggett v. Bullitt*, 371 U.S. 360 (1964); *NAACP v. Brnnett*, 360 U.S. 471 (1961).

CONCLUSION

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED PURSUANT TO RULE 16 OF THE RULES OF THIS COURT.

Respectfully submitted.

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Ky. Adm. Rules 1-105 §§ 7, 7(1) 17

Delaware, Harness Racing Comm. Rules, Rule 2(d) 17

Ohio, ORC § 3769.091 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, et al.,

*Appellants,**

against

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

Opinions Below

The opinion of the Three-Judge District Court for the Southern District of New York is reported at 436 F. Supp. 775 and reproduced in the appendix to the jurisdictional

* In addition to the present chairman of the N.Y. State Racing and Wagering Board, appellants include its other members, Bertram D. Sarafan (chairman at the commencement of this action)

(footnote continued on following page)

statement beginning page J.S. 3a.* The opinion of the District Court granting appellee's motion to convene a three-judge court is not yet reported. It is reproduced beginning at page J.S. 23a.

Jurisdiction

The judgment of the District Court was entered on September 15, 1977. Notice of Appeal was filed September 26, 1977. By order of Mr. Justice Marshall dated December 1, 1977, the time within which to docket this appeal was enlarged to December 5, 1977. The jurisdictional statement was filed on December 5, 1977. Probable jurisdiction was noted on March 20, 1978.

The jurisdiction of this Court to review the judgment by appeal is conferred by 28 U.S.C. § 1253. See, *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975).

Question Presented

Does a statute providing for summary suspension of the occupational license of a harness racing industry participant prior to any hearing and determination of disciplinary charges deny such licensee due process or equal protection of the laws?

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and Joseph H. Boyd, Jr.; the term of former member Eugene J. Keogh, defendant below, having expired. See U.S. Sup. Ct. Rules, Rule 48 (3). Also appealing are Hugh L. Carey and Louis J. Lefkowitz respectively, Governor and Attorney General of the State of New York. The Governor was apparently named as defendant because of his general executive responsibilities, N.Y. Const. Art. IV, § 3 and the Attorney General because of his responsibility to appear in defense of constitutionality of statutes, N.Y. Executive Law § 71.

* Page references to the appendix to the jurisdictional statement are indicated "J.S. a"; page references to the appendix are indicated by numbers followed by "a".

Statute Involved

McKinney's New York Unconsolidated Laws § 8022, 1977-78 Supp., p. 177 provides as follows:

§ 8022. Hearing of refusal or revocation of license

"If the state harness racing commission shall refuse to grant a license applied for under this act, or shall revoke or suspend such a license granted by it, or shall impose a monetary fine upon a participant in harness racing the applicant or licensee or party fined may demand, within ten days after notice of the said act of the commission, a hearing before the commission and the commission shall give prompt notice of a time and place for such hearing at which the commission will hear such applicant or licensee or party fined in reference thereto. Pending such hearing and final determination thereon, the action of the commission in refusing to grant or in revoking or suspending a license or in imposing a monetary fine shall remain in full force and effect. The commission may continue such hearing from time to time for the convenience of any of the parties. Any of the parties affected by such hearing may be represented by counsel, and the commission may be represented by the attorney-general, a deputy attorney-general or its counsel. In the conduct of such hearing the commission shall not be bound by technical rules of evidence, but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. In connection with such hearing, each member of the commission shall have the power to administer oaths and examine witnesses, and may issue subpoenas to compel attendance of witnesses, and the production of all material and relevant reports, books, papers, documents, correspondence and other evidence. The com-

mission may, if occasion shall require, by order, refer to one or more of its members or officers, the duty of taking testimony in such matter, and to report thereon to the commission, but no determination shall be made therein except by the commission. Within thirty days after the conclusion of such hearing, the commission shall make a final order in writing, setting forth the reasons for the action taken by it and a copy thereof shall be served on such applicant or licensee or party fined, as the case may be. The action of the commission in refusing to grant a license or in revoking or suspending a license or in imposing a monetary fine shall be reviewable in the supreme court in the manner provided by the provisions or article seventy-eight of the civil practice law and rules. As amended L.1962, c. 311, § 32; L.1963, c. 6, both eff. Sept. 1, 1963."

Statement of the Case

This is an appeal from a judgment of a three-judge District Court for the Southern District of New York, enjoining enforcement of N.Y. Unconsolidated Laws § 8022 as being in violation of the due process and equal protection clauses of the Fourteenth Amendment (JS. 1a).

Appellee, a licensed trainer of harness race horses (6a), instituted this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), challenging the constitutionality of N.Y. Unconsolidated Laws § 8022 (5a). He claimed that § 8022 denied him the right to due process of law in that it denies a licensee a pre-suspension hearing (9-10a); and, that this statute violated his right to equal protection of the laws because § 8022 precluded stays pending review to harness racing licensees, whereas such a restriction does not apply to thoroughbred racing licensees (11-13a).*

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*"Appellee also contended that the Board's rules, 9 NYCRR §§ 4[illegible].11, 4120.5 and 4120.60, reproduced at page J.S. 5a, esta-

(footnote continued on following page)

On July 10, 1976, appellee Barchi's license to train harness race horses was ordered suspended for 15 days by John F. Fay, presiding steward and judge at Monticello Raceway. This penalty was imposed after traces of the drug "Lasix" had been found in the urine of "Be Alert", one of the horses entrusted to his care which had participated in a race. This followed a routine test performed on June 24, two days after "Be Alert" placed second in the third race at Monticello. The administration of such drug to a harness racing horse within 48 hours is prohibited by New York State Racing and Wagering Board Rule 9 NYCRR 4120.4 (6-7a).

The District Court issued a temporary restraining order on July 13, 1976 enjoining the Board from further execution of its decision (22a). On December 23, 1976, defendants' motion for dismissal of the complaint for lack of subject matter jurisdiction was denied and a three-judge district court was convened, per GOETTEL, J. (2a, J.S. 23a).

The Board urged the three-judge court to abstain until the State courts passed upon its contention that under its construction of § 8022, it was, in fact, authorized to stay the suspension of a harness racing license, relying upon *Carey* v. *Sugar,* 425 U.S. 73 (1976) (J.S. 9a). The court acknowledged this doctrine, but felt that the New York Court of Appeals' decision in *Tappis* v. *N. Y. State Racing and Wagering Board,* 36 N Y 2d 862, 330 N.E.2d 697 (1975), constituted authoritative disposition of the question herein, thus paving the way for federal court adjudication (J.S. 10-11a).

The Court held that N.Y. Unconsol. Laws § 8022 was unconstitutional as violative of Barchi's right to due process under the Fourteenth Amendment because it permitted

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lish a constitutionally improper presumption of guilt with respect to the trainer's responsibility, drugging of horses and making the trainer an "insurer" of his horse's conditions as a matter of law (13-5a). The court sustained the rules on their face (J.S. 20-21a)

revocation or suspension of a harness race horse trainer's license without either a pre-suspension or prompt post-suspension hearing (J.S. 21a).

The District Court looked to the nature of the interest to be protected and held it to be an "interest [which] can be an entitlement subject to due process consideration" (J.S. 13a). The court felt that the statutory protections did not comply wih due process procedures according to the balancing of interests involved, as set forth in *Matthews* v. *Eldridge,* 424 U.S. 319 (1976). The court acknowledged the substantial interest of the state, stating that "in appropriate circumstances [it] justifies summary suspension prior to hearing or formal determination" (J.S. 13-15a). However, the court ruled that the private interest at stake was sufficient to override the state's interest so as to warrant prohibition of the unvariable application of pre-hearing suspension (J.S. 15-16a).

The court also held that the prohibition of stays pending review in the harness racing industry without a parallel prohibition in thoroughbred racing constituted a denial of equal protection because of the state's failure to show a rational basis for this distinction (J.S. 21a).

Statutory History

To understand the regulation of harness racing, particularly in the State of New York, one must recall that prior to the introduction of pari-mutuel betting in 1940, it was essentially an amateur sport conducted at county fairs for small purses, *Interim Report of the N.Y. State Joint Legislative Committee to Study All Laws, Rules and Regulations Relative to Horse Racing in New York State,* 1952 N.Y. Legis. Doc., No. 49 (hereinafter Legislative Report) p. 75. When pari-mutuel betting was established, the Legislature essentially entrusted the regulation of harness racing, including the adoption of rules, to the United States Trotting

Association, a private national organization created in 1932 by a group of wealthy sportsmen, to maintain breeding records and to promte the sport, *Id.,* pp. 23, 75. Thus the Legislature followed the pattern established for thoroughbred racing, which, by statute, was conducted under the aegis of the Jockey Club, *Id.,* p. 23. See *Grannan* v. *Westchester Racing Assn.,* 153 N.Y. 449, 47 N.E. 896 (1897).

In contrast to thoroughbred racing tracks which are operated by non-profit corporations organized for the "improvement of the breed", N.Y. Unconsol. Laws § 7902, parimutuel harness tracks have always been operated for profit. By 1951, they had grown into multi-million dollar enterprises, Legislative Report, p. 73.

The decision of the New York Court of Appeals in *Fink* v. *Cole,* 302 N.Y. 216, 97 N.E. 2d 873 (1951), holding that the delegation of regulatory power over thoroughbred racing to the Jockey Club to be a violation of the State constitution, forced the Legislature to take immediate action. It enacted direct state supervision over racing, L. 1951 c. 324 and established joint legislative committee to conduct a comprehensive study of all aspects of horse racing in the State of New York, Legislative Report, pp. 9-10. *Regulation and Control of Harness Racing in State,* 1954 N.Y. Legis. Doc. No. 86, p. 5.

Thus the stringent licensing and disciplinary provisions which govern harness racing in the State of New York, including the provisions for summary suspension of a licensee pending a hearing on disciplinary charges are part of a comprehensive legislative treatment of the subject, prompted by a demonstrated need for stern, even Draconian measures.

Definitive regulation of harness racing was not accomplished, however, until after scandal and violence had surfaced in the industry. Precipitated by the murder of two officials of a union representing harness track employees in August, 1953, Governor Dewey, acting under N.Y. Execu-

tive Law § 6 (known as the Moreland Act), set up a commission to inquire into specific charges of conflict of interest and labor racketeering as well as the general regulation of harness racing, *Report of the New York State Commission to Study, Examine and Investigate State Agencies in Relation to Pari-Mutuel Harness Racing to Hon. Thomas E. Dewey, Governor of the State of New York, May 6, 1954* (hereinafter "Moreland Commission Report"), 1954 Public Papers of Gov. Dewey, pp. 505, et seq., at 507.

In addition to presenting the evidence regarding the conflict of interest situation, Id. at 507 and its findings on the corruption existing within the harness employee union, particularly with regard to its welfare fund, Id. at 509, the Commission, after extensive investigation, including an examination of racing statutes and rules of all the states of the union, as well as the rules of the U.S. Trotting Association, Id. at 510, recommended major changes in the harness racing laws, *Id.*, 509-512.

> The Commission was conscious of the necessity for the adoption of new legislation during the 1954 session of the Legislature if any substantial steps were to be taken to remedy the existing conditions during the 1954 racing season. The Commission felt that unless prompt steps were taken, pari-mutuel harness racing during this year might be jeopardized, with consequent loss of substantial revenue by the State. Id. at 511.

The Commission's recommendations, enacted as Chapters 5, 112, 356, 387, 411 and 510-516 of the Laws of 1954 considerably tightened State regulation over harness racing, Id. at 511-512, and included the provisions of Unconsol. Laws § 8022 held unconstitutional by the District Court, L. 1954 C. 510 § 8.

In recommending adoption of the Moreland Commission's recommendations, Governor Dewey, in a message to the Legislature noted that the powers he proposed to give to the Harness Racing Commission "are admittedly severe and far reaching. I know of no other situation except this

special type of government-granted monopoly in which they would be warranted and here I believe they are necessary," *Message of the Governor in relation to Regulation and Control of Harness Racing in State,* 1954 N.Y. Legis. Doc. No. 86, p. 5.

In 1973, the Legislature in an effort to promote economy and improve administrative performance created the present State Racing and Wagering Board, which took over administration both of thoroughbred racing and harness racing [inter alia], although preserved the facade of both separate commissions, N.Y. Unconsol. L. § 7951 as added by L. 1973 chaps. 346, 347. But for the purposes of regulation, the two sports are separately provided for and administered.

The extent of the exercise of this authority to suspend is unclear at this date. Both in the sport of harness racing (Unconsol. Laws, § 8022) and thoroughbred racing (Id. § 7915), the Legislature has provided for this authority. However subsequently the Legislature enacted the Administrative Procedure Act which became effective September 1, 1976. Section 401(3) of that Act provides for authority to suspend if the public health, safety or welfare so requires. See J.S. p. 8. At the same time the Legislature in § 102 of that Act excluded certain agencies specifically and others by description from the requirements of § 401 (3) of the Act. In the *Matter of Gerard* v. *Barry,* 59 AD 2d 901, —— N.Y.S. 2d ——, which involved suspension in thoroughbred racing, the Appellate Division, Second Department, ruled that it was jurisdictionally necessary for the Racing Board in imposing a suspension to comply, nevertheless, with § 401(3) of the State Administrative Procedure Act.

The State has taken the position that the Appellate Division mistakenly applied the requirements of N.Y. SAPA § 401(3) to the *Gerard* case ignoring the controlling mandate of N.Y. Uncons. L. § 7915. The requirements of N.Y. SAPA § 401, on their face, do not apply since Article 4 ap-

plies only when "licensing is required by statute to be preceded by notice and opportunity for hearing" (N.Y. SAPA § 401[1]). Uncons. L. § 7915(3) does not require such prior notice and hearing. This question of State law remains open to date.*

Summary of Argument

I.

A license to work in a regulated industry or to engage in an activity supervised by the State, particularly in that involved on this appeal, may be summarily suspended prior to a hearing, when the legislative intent to protect the public interest by the provision is manifest as here, *Arnett* v. *Kennedy,* 416 U.S. 134, 152-154 (1974). It has long been recognized that where the statute (here N.Y. Unconsol. L. § 8022) gives an opportunity for a prompt hearing, following the administrative action this satisfies the requirements of due process, *Dixon* v. *Love,* 431 U.S. 105 (1977); *Mathews* v. *Eldridge,* 424 U.S. 236 (1976); *Arnett* v. *Kennedy, supra.*

Even if the licensee were entitled to some informal type of hearing, this was satisfied in the instant case, *Goss* v. *Lopez,* 419 U.S. 565 (1975).

II.

Whatever distinctions are made in the racing statutes between thoroughbred and harness racing are rationally based and therefore should have been upheld by the district court, under its own expressed standard of analysis. In any event, the practice of the appellant Board is to treat thoroughbred and harness licensees substantially alike in disciplinary matters.

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* The New York SAPA is derived from the widely-adopted Model State Administrative Procedure Act. See Vol. 13, Unif. Laws Ann. and McKinney's, N.Y. State Administrative Procedure Act, p. 1 (1977).

POINT I

A pre-hearing suspension of an occupational license in a strictly regulated industry conforms to the requirements of due process of law. The appellee's fifteen day suspension was not subject to this constitutional objection.

Horse racing is an industry long recognized to be subject to the state's police power, *Western Turf Ass'n* v. *Greenberg,* 204 U.S. 354, 363 (1907). Moreover, in the State of New York, were it not for special legislative dispensation, horse racing would be illegal. N.Y. Const., Art. I, § 9, *Ailano* v. *Westchester Racing Ass'n,* 265 App. Div. 225, 229, 38 N.Y.S. 2d 741, 745 (2d Dept., 1942).

Thus, appellee's privilege to work as a harness horse trainer is inextricably linked to and limited by the statute which legalized this activity. As we showed in our outline of the legislative history, pp. 7-9 *supra,* it was a statute drawn with particular strictness in response to a demonstrated need to protect the integrity of racing and the State's revenues against fraud, conflict of interest, racketeering and violence. Having chosen to work in this strictly regulated industry and having accepted the benefits of a license, appellee should be precluded from challenging the conditions of his licensure, including the procedures under which he is subject to being disciplined. *Arnett* v. *Kennedy,* 416 U.S. 134, 152-154 (plurality opinion) (1974).

Pursuant to the statute (Unconsol. Laws § 8022) appellee could have received a full, quasi-judicial hearing within a few days. He never, requested a hearing: instead, he commenced this injunctive action. As *Dixon* v. *Love,* 431 U.S. 105 (1977), teaches, such a statute which authorizes the summary suspension of a license to engage in an occupation or other activity which is subject to strict public regulation, but with an opportunity for a prompt hear-

ing before the licensing authority, has long been recognized as conforming to the requirements of due process.

In *Dixon,* this Court upheld a statute authorizing the summary suspension of a driver's license where the operator has been repeatedly convicted of traffic infractions, where he could receive a hearing within twenty days, 431 U.S. at 109. While § 8022 provides for a "prompt" hearing and a determination within thirty days, the record shows that a hearing could be scheduled within a few days of a demand, Transcript, May 4, 1977, p. 29.

Dixon is only one of the latest in a series of cases decided by this Court which demonstrates the error in the judgment below.

It is a doctrine well-established by this Court that "due process, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 at 895 (1961). It is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U.S. 471 at 481 (1972). With regard to the deprivation of a "liberty" or "property" interest, "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge, supra,* 424 U.S. at 333 (1976).

Thus, due process does not require a hearing "in every conceivable case of government impairment of private interest," *Cafeteria Workers* v. *McElroy, supra,* 367 U.S. at 894; *Stanley* v. *Illinois,* 405 U.S. 645, 650 (1971), nor is it a rigid requirement that there be a hearing prior to the termination by the state of every liberty interest or propetry right protected by the Constitution. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972).

This Court has repeatedly held that an opportunity to be heard need not be given until some time after such deprivation. *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), gov-

erning discipline of civil servants; *Mathews* v. *Eldridge,* 424 U.S. 236 (1976), governing the discontinuance of disability benefits; *Montayne* v. *Haymes,* 427 U.S. 236 (1976) and *Meachum* v. *Fano,* 427 U.S. 215 (1976), governing prison transfers; *Ingraham* v. *Wright,* 430 U.S. 657 (1976), governing corporal punishment in the schools and *Dixon* v. *Love, supra,* all authorized the imposition of sanctions prior to a hearing. Even in *Goss* v. *Lopez,* 419 U.S. 565 (1975), which limited the right to suspend pupils from school, this Court authorized summary suspension where necessary to protect the safety of persons and property.

This is in clear contrast to those limited circumstances where this Court required a hearing prior to the deprivation of a protected interest, see, e.g., *Goldberg* v. *Kelley,* 397 U.S. 254 (1970), involving the termination of welfare benefits, and *Bell* v. *Burson,* 402 U.S. 535 (1971), which prohibited the summary suspension of a driver's license for failure to post security sufficient to satisfy an unadjudicated tort claim. Such decisions are the exception.

Goldberg v. *Kelley* reflects a special concern for the destitute who depend upon public assistance for the barest essentials of life.

Bell v. *Burson* recognizes the importance of the liberty to travel which is embodied in a driver's license; a liberty which is preferred over the unadjudicated claim of a civil litigant. Similar considerations in protecting the property of civil defendants from arbitrary interference prevailed in *Fuentes* v. *Shevin,* 407 U.S. 67, 90 (1972), in which a preseizure hearing was required for the issuance of a writ of replevin; *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969), which precluded pre-judgment wage garnishment. But, see *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 606, 607 *et seq.,* and cases cited therein (1974), which, distinguishing *Fuentes* and *Sniadach* upheld the sequestration in favor of the holder of a conditional sales contract where the statute

provided for a prompt opportunity to seek dissolution of the writ.

An examination of these cases demonstrates the correctness of the decisions of the two United States Court of Appeals which have already ruled that the state interest in regulating the racing industry outweighs the licensee's interest in obtaining a hearing prior to imposition of disciplinary action, *Ruane* v. *N.Y. State Racing & Wagering Board,* 532 F. 2d 860 (2d Cir., 1976), which upheld the summary imposition of fines on jockeys for failing to fulfill riding engagements and *Hubel* v. *West Virginia Racing Comm.,* 513 F. 2d 240 (4th Cir., 1975). See also, *Gilmour* v. *N.Y. State Racing & Wagering Board,* 405 F. Supp. 458 (S.D.N.Y., 1975). In *Gilmour,* District Judge Edward Weinfeld, reviewed the sometimes stormy history of harness racing, 405 F. Supp. at 460-461; and found the informal conference-type "opportunity to be heard" afforded to appellee herein (6-7a), as constitutionally adequate, *ibid.* See also: *Goss* v. *Lopez, supra;* Friendly, "Some kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975). See also: *Board of Curators, etc.* v. *Horowitz,* ——— U.S. ———, 46 U.S.L.W. 4179, 4180-4181 (March 1, 1978) which upheld an academic dismissal from a state-operated medical school, in which this Court assumed that whatever liberty interest the student may have had in pursuing a chosen career was satisfied by such informal procedures.

The District Court, perhaps under constraint of the Second Circuit's *Ruane* decision, *supra,* and the persuasiveness of Judge Weinfeld's reasoning in *Gilmour,* gave lip service to *Hubel* v. *West Virginia Racing Commission, supra.* However, by attempting to draw factual distinctions that would show pre-hearing sanctions to be inappropriate (J.S. 15a, *et seq.*), that court completely ignored the holding of *Hubel* that a state may, under *all* circumstances, despite any loss that a licensee might incur, provide

for an absolute pre-hearing suspension rule for racing licensees.

> "The state has at least two substantial interests to be served. It has a humanitarian interest in protecting the health of the horse, and it has a broader and more weighty interest in protecting the purity of the sport, both from the standpoint of protecting its own substantial revenues derived from taxes on legalized parimutuel betting and protecting patrons of the sport from being defrauded. Collectively, these interests, we think, justify the severe penalty of disqualifying a horse that has been drugged, its trainer and perhaps its owner, from further participation in legalized racing until the matter can be heard and determined and an appropriate final sanction formulated. The combination of strict liability, imposed by Rule 793, and immediate suspension without the possibility of stay, deters tampering and promotes care. The combination also removes from racing those who have proved either unable or unwilling to protect their horses from unauthorized drugs." *Hubel, supra,* 513 F. 2d at 243.

It is of no constitutional consequence that the minimal delay between the licensee's suspension and the final disposition of the charges may result in an irretrievable loss of income. Unlike the welfare recipients in *Goldberg* v. *Kelley, supra,* the only case in which this Court has imposed a full quasi-judicial hearing upon the state prior to the deprivation of a public benefit, appellee voluntarily chose to work in the racing industry. The Legislature in permitting this otherwise illegal activity has determined that possible irreparable injury must be subordinated to the public interest in the proper conduct of the regulated activity. Faced with a similar claim of irreparable injury; that the collection of certain taxes claimed by the federal government *would destroy a business,* this Court unanimously refused to enjoin such collection, *Enochs* v.

William Packing & Navigation Co., Inc., 370 U.S. 1, 6 (1962). Likewise, in *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974), petitioner university sought injunctive relief to prevent revocation of its tax-exempt status, alleging irreparable injury in the form of income tax liability and loss of irretrievable contributions. In affirming the Fourth Circuit's decision that the suit was barred by the anti-injunction act, § 7421(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 7421(a), this Court held that the impermissibility of a pre-enforcement injunction did not constitute a denial of due process, despite the alleged irreparable injury, pending resort to alternative procedures for review. In noting petitioner's alternative remedies, available after revocation of its tax-exempt status, the Court stated:

> "This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different . . . we do not say that these [post enforcement] avenues of review are the best that can be devised. They present serious problems of delay, during which the flow of donations to an organization will be impaired and *in some cases perhaps even terminated* . . . [A]lthough the Congressional restriction to post enforcement review may place an organization claiming tax-exempt status in a precarious financial position, the problems presented do not rise to the level of constitutional infirmities *in light of the powerful government interest* in protecting the administration of the tax system from premature judicial interference . . . and of the opportunities for review that are available. (*Bob Jones University* v. *Simon, supra,* 416 U.S. at 746-748)" (citations omitted) (emphasis added).

The economic health of the racing industry and the public revenues it generates depends on its acceptance by the public as a fair and honest sport. New York and a

number of other states, have enacted statutes designed to achieve this purpose, including provisions for swift action in cases of suspected violations of law or racing rules.*

The dependence of the State's revenue upon this acceptance is evidenced by the legislative declaration accompanying the enactment of a revised pari-mutuel revenue provision, L. 1977, c. 267 § 1 reading in part:

> "The Legislature further declares that the revenue the state has received from pari-mutuel betting since its inception has been and is a basic necessity to the support of the state and local governments, and that the large amount of real estate and school tax monies paid by the tracks and horse breeding farms is significantly important to taxpayers in local communities, that the large number of persons employed in the many fields of endeavor that provide the horses for the tracks and breeding farms, and by their supportive suppliers con-jointly constitute an intrinsic segment of the state's economy."

Whatever personal hardship, if any, may result from a short pre-hearing suspension, we have demonstrated that such a procedure is necessary to protect the integrity of racing, its public acceptability and the State's revenues and is well within the parameters of due process.

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* See J.S. at p. 5. In addition, a subsequent survey of state racing commissions indicates summary suspensions by stewards pending review authorized in California, Cal. Adm. Code, Title 4, Chap. 4, Rule 1761 (discretion to grant stay available); Colorado, (discretionary stay available) CRS §§ 12-60-105.5(4)(b)(6); 24-4-104(4); Florida, Fla. Adm. Code 7E-107(7) (discretionary judicial stay available); Kentucky (thoroughbred racing) Rules of Racing § 2, New Hampshire, (horse) Rules of Racing §§ 244, 251; (greyhound) by administrative interpetation of rules and by consent of license applicant, letter from Counsel, N.H. Greyhound Racing Comm. 4/3/78. However, automatic stays from stewards' rulings are granted in Kentucky for harness licensees, Ky. Adm. Rules 1:105 §§ 7, 7(1) Delaware, Harness Racing Comm. Rules, Rule 2(d) and Ohio, ORC § 3769.091.

We submit that the unanimous memorandum opinion of the New York Court of Appeals in *Matter of Tappie* v. *New York Stock Racing and Wagering Board,* 36 NY.2d 862, 331 N.E.2d 697, 370 N.Y.S.2d 972 (1975) is unassailable.

> "The compelling and substantiated State interest involved in maintaining discipline among trainers and owners . . . justifies on the spot sanctions and penalties in advance of hearings, and the procedure here followed involved no infringement of petitioner's constitutional rights and complied sufficiently with the requirements of the due process clause of the Federal and State Constitutions. (*Matter of Sanford* v. *Rockefeller,* 35 NY2d 547; *Matter of Jerry* v. *Board of Educ. of City School Dist. of Syracuse,* 35 NY2d 534; cf. *Arnett* v. *Kennedy,* 416 U.S. 134.)"

It is to be noted that the above cited *Sanford* case was dismissed upon appeal by this Court "for want of a substantial federal question." (421 U.S. 973, 95 S. Ct. 1972 [1975].) sub nom. *Sanford* v. *Carey.*

Following the *Tappis* and *Sanford* cases, the New York Court of Appeals in a precursor to *Dixon* v. *Love, supra,* upheld mandatory license revocations after speeding convictions in *Matter of Horodner* v. *Fisher,* 38 NY2d 680, 345 N.E. 2d 571, 382 N.Y.S.2d 28 and this Court dismissed the appeal without dissent for "want of a substantial federal question," 429 U.S. 802 (1976).

Here the District Court exhibited unusual insensitivity to the exercise of this authority in such cases as that involving appellee. The participation of a drugged horse in a horse race amounts to an effort to upset the betting probabilities, illegally to the detriment of the vast number of persons at the track as paid patrons, but also those who patronize off-track betting, involving very substantial sums of money, See *Matter of Sullivan Harness Racing Assn.* v. *Glasser,* 30 N.Y. 2d 269, 283 N.E. 2d 603, 332 N.Y.S. 2d

622 (1972). It is also a fraud on the other participants in the particular race. The insistence therefore of the District Court that one who may be responsible for such blatant fraud upon the public and the other participants must be permitted to continue to participate in racing pending the completion of an adversary hearing upon charges, is a gross disservice to the State and to the regulation of this sport, and other regulated sports; in New York and throughout the nation. The drugging of race horses cannot be tolerated. *Matter of Smith* v. *Cole,* 270 App. Div. 675, 62 N.Y.S. 2d 226 (1946), and here it is an undisputed fact that there was detection of such drugging after the completion of a particular race.•

POINT II

The equal protection claim as found by the District Court is without any tenable merit.

The District Court specifically ruled that any distinction in the treatment of thoroughbred and harness licensees would be upheld if justified by a rational basis, J.S. 18a. However, it took constitutional umbrage in a particularistic distinction between suspensions directed under the thor-

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• If, as the Appellate Division, Second Department held in *Gerard, supra,* the requirement in N.Y. State Administrative Procedure Act § 401(3) is applicable to the suspension provisions in Unconsol. Laws § 8022, the imposition of such a suspension must be accompanied by a finding that public welfare requires such action. It has been the position of the State that a suspension obviously reflects a finding of public welfare, in a "drugged horse" case since the participation of a drugged horse in a race is anathema to honest horse racing.

The same court has applied *Gerard* to the suspension of a doctor from treatment of workmen under the Workmen's Compensation Law because of fraud, *Miller* v. *Cooperman,* —— A.D. 2d ——, —— N.Y.S.2d —— (2d Dep't, March 15, 1978). As we have noted, motions for leave to appeal in both cases are pending in the New York Court of Appeals.

oughbred racing law and that under the harness racing law. Under the former, suspensions are made after the hearing on charges or appeal to the administrative body, N Y. Unconsol. Laws § 7915. Under the harness racing law, the suspension or revocation is a firm administrative disposition unless the licensee requests a hearing, *Id.* § 8022. The District Court criticized as constitutionally defective the statement in § 8022 that pending the hearing the disposition shall remain in effect.

This procedure, in line with that described by this Court in *Arnett* v. *Kennedy, supra,* is in recognition of the differences in treatment by the State of the two sports, which, throughout their history have received different treatment, *Roosevelt Raceway* v. *County of Nassau,* 18 N.Y. 2d 30, 218 N.E. 2d 539, 271 N.Y.S.2d 662 (1966), app. dis. 385 U.S. 453 (1967); *National Ass'n of Harness Drivers* v. *New York State Racing Commission,* 57 Misc 2d 135, 291 N.Y.S. 2d 475 (Sup. Ct. N.Y. Co. 1968). Thus the statutory differences should have been upheld, see e.g., *Dandridge* v. *Williams,* 397 U.S. 471 (1970), *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973).

To compound the error, the district court overlooked the appellants' evidence that the alleged distinctions in the treatment of thoroughbred and harness licencees were illusory. See affidavit submitted by the Board's chief counsel and chief steward to the district court (34a; J.S. 28a) to the effect that harness and thoroughbred licensees were treated alike in disciplinary matters and that in fact, the Board does, where appropriate, stay or suspend a penalty pending administrative review; and counsel's offer of proof as to the manner in which the Board construed the racing statutes, Transcript of May 4, 1977, pp. 27-30.

At the very least, the district court should not have awarded judgment to plaintiff without further evidentiary hearings, Fed. R. Civ. P., Rule 56(c)(d).

CONCLUSION

The judgment appealed from should be reversed.

Dated: New York, New York
May 22, 1978

Respectfully submitted,

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• Counsel gratefully acknowledges the assistance of Ms. Elise Hagouel Langsam, SUNY at Buffalo, School of Law, Class of 1978, and a Legal Aide at the Attorney General's office.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, et al.,

Appellants,

-against-

JOHN BARCHI,

Appellee.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR APPELLEE

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, et al.,

Appellants,

-against-

JOHN BARCHI,

Appellee.

On Appeal from the United States District Court For the Southern District of New York

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BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

Appellee submits this brief in support of the judgment of a three judge Court entered on the 5th day of September, 1977 in the Southern District of New York declaring Section 8022 of the Unconsolidated Laws of the State of New York to be Unconstitutional to the extent that it allows the New York State Racing & Wagering Board to suspend a licensee for cause, without a prior hearing on the charges. *Barchi v. Sarafan,* 436 F. Supp. 775 (S.D.N.Y., 1977).

QUESTIONS PRESENTED

1. Is Due Process of Law violated where a State Administrative Agency deprives a licensee of his right to earn a livelihood for cause, prior to suspension hearing, on the charges?

2. Is a State statutory classification rational, within the meaning of Equal Protection of Law, that authorizes a stay of suspension against a licensee engaged in thoroughbred racing, but not a licensee engaged in harness racing, pending administrative review?

3. Is there a Due Process of Law rational connection between the fact that medication was administered to a horse within forty-eight hours of a race and the administrative presumption that it was caused by the intentional or negligent act of the horse's trainer, when others, including State racing officials have the same right of access to the animal during that period?

SUMMARY OF ARGUMENT

I

Due Process of Law is violated by a State statutory scheme that authorizes the revocation or suspension of the Constitutionally protected private right to work in a licensed occupation to wit, training harness racing horses without a prior hearing, which results in irreparable loss of income and of business continuity, and the risk of an erroneous deprivation is great. *Matthews v. Eldridge,* 424 U.S. 319 (1976).

Since all of such summary revocations or suspensions of necessity occur after the incident in issue and often times days or weeks later, there is no emergency basis for a summary suspension or license revocation without a prior hearing and the interest of the State can adequately be

served by the normal procedure indigenous to other licensed occupations and professions, by delaying punishment, until after the hearing and decision making process runs its course. *Goss v. Lopez,* 419 U.S. 565 (1975).

II

Equal protection of law is violated by a State regulatory scheme that prohibits stays of license revocation or suspension to harness racing licensees but not to thoroughbred racing licensees, since there is no reasonable distinction between the two classes of licensees. *Stanley v. Illinois,* 405 U.S. 645 (1971).

III

Due Process of law is violated by an administrative presumption that the trainer of a horse was guilty of negligence or intentionally wrongful conduct drawn from the fact that the horse trained by him allegedly proved to be drugged within forty-eight hours of a race, where the trainer does not have the right to exclusive possession and control of the horse during this time and may not exclude racing officials, employees of the race track, other trainers, drivers, grooms and members of the public from the area where the horse is kept. There is no rational connection between the fact proven and the fact to be presumed. *Tot v. United States,* 319 U.S. 463 (1943); *Allen v. County Court, Ulster County,* 568 F.2d 998 (2nd Cir., 1977).

IV

Where a State statute or regulation is under challenge, and there is no action pending in State Court where the issue can be litigated and no need for a State Court inter-

pretation of its clear language, the State's highest court having construed it, and the statute or regulation does not involve a complex State rate making or taxation scheme, 42 U.S.C. 1983 allows the Appellee to select a Federal Court to litigate his claim and Federal abstention under such circumstances would constitute an abuse of discretion. *Monroe v. Pape,* 365 U.S. 658 (1961); *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964); *Carey v. Sugar,* 425 U.S. 73 (1976).

STATEMENT OF THE CASE

Appellee, JOHN BARCHI is a licensed harness racing trainer, pursuant to Rule 4101.24[1] of the Rules of the New York State Racing & Wagering Board. On the 22nd day of June, 1976, a horse trained by him, "BE ALERT,"

1. 9 NYCRR §4101.24 in pertinent part provides as follows:

4101.24 Occupational licenses. (a) No person shall participate in the affairs of any association or corporation licensed by the New York State Harness Racing Commission to conduct harness race meetings at which pari-mutuel betting is permitted as director, agent, or employee of such track licensee, unless such person shall have received an occupational license from the commission.

(b) No person shall participate in or at any harness horse race meet as owner, driver, trainer, assistant trainer, groom, farrier, harness goods supplier, salesman, veterinarian, agent, or be the holder or operator of any concession, or perform any service, including but without limiting the generality thereof, the conduct of negotiations on behalf of any person or persons who engage in any racing activities or perform any services in connection with the conduct of any harness horse race meet, or engage in any occupation or employment at any harness horse race meet, unless such person shall have received an occupational license from the commission, with the following exceptions:

(1) Public officers and public employees engaged in the performance of their official duties.

(2) Persons exempted by the commission from the occupational license requirement.

(c) It shall be the responsibility of each track licensee to prevent any person not holding an occupational license from doing or performing any act or acts at its track.

placed second in the third race at Monticello Raceway in New York State. (6a)*

On June 24th, two days later, Appellee was given notice by John F. Fay, the official Steward-Presiding Judge of the New York State Racing & Wagering Board at Monticello that urine tests had revealed that "BE ALERT" had been improperly treated with the drug "Lasix" in violation of Rule 4120.4[2] of the Rules of the New York State Racing & Wagering Board, that prohibits such treatment within forty eight hours of a race. (6a-7a).

Realizing the seriousness of the charges and the impact it might have on his livelihood, Appellee voluntarily underwent a lie detector test on the 28th day of June, 1976 administered by Victor C. Kaufman of the New York Lie Detection Laboratories, who issued a written report that Appellee was truthful in his denial that he had administered the drug to the animal charged to him. (7a, 17a-18a).

On the 29th day of June, 1976, the New York State Racing & Wagering Board had its own lie detector test administered to Appellee, the results of which likewise in-

*Page references to the appendix are indicated by numbers followed by "a"; page references to the appendix to the Jurisdictional Statement are indicated "J.S. a".

2. 9 NYCRR §4120.4—

4120.4 Prohibition. No person shall, or attempt to, or shall conspire with another or others to:

(a) Stimulate or depress a horse through the administration of any drug, medication, stimulant, depressant, hypnotic or narcotic.

(b) Use any electrical device or any electrical equipment or any mechanical or other appliance not generally accepted as regulation racing equipment to stimulate, depress, goad, spur or retard a horse during a race, a warm-up in preparation therefor, or in the paddock before a race.

(c) Freeze or ice a horse's leg or legs within the paddock area on the day in which such horse is programmed to race.

(d) Administer any drug, medicant, stimulant, depressant, narcotic or hypnotic to a horse within 48 hours of its race.

dicated that he was truthful when he stated he knew nothing about the administration of "Lasix" to "BE ALERT."

Nevertheless, and effective on the 10th day of July, 1976, some eighteen (18) days after the race, the New York State Racing & Wagering Board suspended Appellee and all horses owned or trained by him, for fifteen (15) days without a prior hearing for violation of Rules 4120.5,[3] and 4120.6[4] and 4116.11[5] of the agency. (29a). The New York State Racing & Wagering Board drew upon Section 8022 of the Unconsolidated Laws of the State of New York for

3. 9 NYCRR

4120.5 Presumptions. Whenever the test or tests prescribed in section 4120.1 hereof disclose the presence in any horse of any drug, stimulant, depressant or sedative, in any amount whatsoever, it shall be presumed:

(a) that the same was administered by a person or persons having the control and/or care and/or custody of such horse with the intent thereby to affect the speed or condition of such horse and the result of the race in which it participated;

(b) that it was administered within the period prohibited by subdivision (d) of section 4120.4 of this Part; and

(c) that a sufficient quantity was administered to affect the speed or condition of such animal.

4. 9 NYCRR

4120.6 Trainers' responsibility. A trainer shall be responsible at all times for the condition of all horses trained by him. No trainer shall start a horse or permit a horse in his custody to be started if he knows, or if by the exercise of reasonable care he might have known or have cause to believe, that the horse has received any drug, stimulant, sedative, depressant, medicine, or other substance that could result in a positive test. Every trainer must guard or cause to be guarded each horse trained by him in such manner and for such period of time prior to racing the horse so as to prevent any person not employed by or connected with the owner or trainer from administering any drug, stimulant, sedative, depressant, or other substance resulting in a positive test.

5. 9 NYCRR

4116.11 Trainer's responsibility. A trainer is responsible for the condition, fitness, equipment, and soundness of each horse at the time it is declared to race and thereafter when it starts in a race.

its authority to suspend Appellee without a hearing, which provides as follows:

> "If the State harness racing commission shall refuse to grant a license applied for under this act, or shall revoke or suspend such a license granted by it, or shall impose a monetary fine upon a participant in harness racing the applicant or licensee or party fined may demand, within ten days after notice of the said act of the commission, a hearing before the commission and the commission shall give prompt notice of a time and place for such hearing at which the commission will hear such applicant or licensee or party fined in reference thereto. Pending such hearing and final determination thereon, the action of the commission in refusing to grant or in revoking or suspending a license or in imposing a monetary fine shall remain in full force and effect." (8a).

On the 12th day of July, 1976, Appellee commenced this action pursuant to 42 U.S.C. 1983 to enjoin the enforcement of the suspension against him, which, in effect deprived him of his right to earn a livelihood, without a prior hearing on the charges of misconduct against him, which he claimed to be in violation of his Constitutional rights to Due Process and Equal Protection of Law secured by the Fourteenth Amendment. (5a). Appellee moved for provisional relief to temporarily enjoin, stay and prohibit enforcement of the fifteen (15) day suspension of his trainer's license, pending determination of the action and for a temporary restraining order, pending determination of the motion for a temporary injunction. District Court Judge Robert J. Ward signed the temporary restraining order on the day it was presented to him, on condition that Appellee post a bond in the sum of $1,500.00, which was posted, thereby staying enforcement of the suspension. (21a-22a).

In support of the motion for provisional relief, Ap-

pellee submitted his affidavit, reciting that he is a harness racing trainer, licensed by the New York State Racing & Wagering Board and trains horses at Monticello Raceway, among which is "BE ALERT", owned by one Walter Littman. (23a).

He alleged that on the 22nd day of June, 1976, "BE ALERT" participated in the third race at Monticello Raceway, placing second. Two days later, he was summoned to the office of John F. Fay, the official Steward-Presiding Judge appointed by the New York State Racing & Wagering Board to supervise all race meets at Monticello Raceway and was told that a urine test had revealed the horse had been improperly treated with the drug Lasix, in violation of Rule 4120.4[6] of the agency, that prohibits such treatment of a horse within forty-eight hours of a race. The investigation was assigned to Daniel Goldberg, the Chief Investigator of the Board.

Appellee explained in his affidavit that "Lasix" is a drug commonly used to clear the sinus cavity of a horse and if administered shortly before a race, it will increase his endurance and therefore, his performance. (24a).

Appellee pointed out in his affidavit that he was never confronted with the urine specimen of "BE ALERT," nor the circumstances under which it was taken. Such confrontation would be material, in that often, these specimens are drawn from numerous horses at the same time, with a strong possibility of a mixup in labeling or in sample testing as is always at risk.

Aware that Section 8022 of the Unconsolidated Laws of the State of New York authorizes a suspension of his license and therefore, of his right to pursue his occupation, without a hearing, on the 28th day of June, 1976, in an effort to convince the Board that he had no complicity in the illegal administration of the medication to the horse,

6. See Note 2, supra.

he voluntarily underwent a lie detector test, which reflected that he was truthful in his responses, that he had no knowledge of the improper medication of the horse. (24a) The following day, at the request of the Board, Appellee underwent a second lie detector test, which he was informed he likewise passed.

Nevertheless, effective July 10, 1976, the Board suspended Appellee for fifteen days, without affording him any type of prior hearing.

In his affidavit, Appellee recited the irreparable injury he would suffer, unless he be granted provisional relief, pending determination of the action.

The affidavit recites that a suspension can and often does cost a trainer his clientele of owners, who hire him to train their horses. The owners must hire new trainers during a period of suspension, since there can be no hiatus in the care of a horse, which includes feeding, training and racing. Thus, there is a great risk that an owner will make new ties and not return to a suspended trainer, even after the suspension expires. Moreover, the bulk of a trainer's income is derived during the racing meet, since it is then that he has opportunity to earn a percentage of the purses earned by the horses under his tutelage. A suspension most times results in irreparable injury for which a licensee has no adequate remedy at law. A trainer or trainer-driver in addition to a daily fee receives a percentage of the purse monies horses entrusted to his care earn in races. There is no remedy for him to make up loss of income and clientele, should it develop at a subsequent hearing that the suspension was improperly imposed. (25a)

In addition, in his affidavit, Appellee challenged the Constitutionality of the Trainer's Responsibility Rule,[7] promulgated by the Board, which raises an inference that the drugging of a horse, resulted either from the inten-

7. See Notes 3, 4 and 5 supra.

tional or negligent act of its trainer, pointing out the lack of rational connection between the fact of wrongful or negligent conduct to be inferred from the fact proven, to wit; improper medication of the animal within forty-eight hours of the race. Appellee pointed out that it is not possible to guard the animal for forty-eight consecutive hours and that race track rules afford grooms, owners, security personnel, race track personnel and even officials of the New York State Racing & Wagering board access to barn area stalls and the paddock, where the horses are housed. Even a member of the public can gain such access. It is conceivable that a dishonest official of the New York State Racing and Wagering Board, grooms from other stables, other owners, other trainers among a host of others, might take advantage of their access to the barns and paddock to medicate a horse on which they had made a sizeable bet or to put a trainer out of business. Thus, the administrative rule creating an evidentiary shortcut is Constitutionally unacceptable, especially where the application of the presumption can produce such dire consequences, to wit; the loss of a licensee's livelihood in a Constitutionally protected occupation. (27a)

In addition, the affidavit of JOSEPH A. FARALDO, Attorney for the Appellee, sworn to the 19th day of July, 1976 recited that he had represented numerous trainers, in thoroughbred and harness racing, charged with violation of the Rules of the New York State Racing & Wagering Board and that in respect of the latter, stays of execution of the suspension, pending administrative review by the Board, are never granted, while in respect to the former licensees, (thoroughbred), they are granted and pointed out that Section 8022 of the Unconsolidated Laws of the State of New York governing procedure for license suspension or revocation for harness racing licensees prohibits a stay pending administrative review, while Section 7915 of the Unconsolidated Laws of the State of New

York governing procedure for license suspension or revocation for thoroughbred licensees does not prohibit such stay, pending administrative review, thereby stamping Section 8022 with a second Constitutional infirmity, that is, violation of the Equal Protection of Law safeguard of the Fourteenth Amendment. (30a-31a).

In opposition to the motion for provisional relief was the affidavit of John M. Dailey, counsel to the New York State Racing & Wagering Board and its Supervising Steward, sworn to the 26th day of August, 1976. In it he explained the suspension of Appellee:

> "In Barchi's case, an unsuccessful attempt had been made to determine the actual party responsible for drugging his horse. When this proved impossible, Barchi was suspended on the basis of his trainer's responsibility . . . . Immediate action was necessary . . . to protect the integrity and reputation of the sport and to insure public confidence. Historically both the tracks and the State authorities have found it imperative that harness racing be conducted fairly both in fact and in appearance. In the past, even the appearance of impropriety has resulted in disorders at the track and jeopardy to the safety of members of the public and the industry." (33a)

He further alleged that, despite the prohibitory language of Section 8022, *supra*, often times the Board will stay the Steward's suspension, pending administrative review, without reciting the criteria used for determining whether to grant such administrative stay or giving specific examples in view of the fact that it would necessarily have to be granted without a hearing. He further urged that any doubt concerning the validity of the State statutes should be resolved by State courts and the Federal court should abstain. (34a)

Mr. Dailey further urged in his affidavit that there is a rational basis for the more harsh procedural treatment af-

forded to harness racing licensees as compared with thoroughbred racing licensees. Harness racing horses are put on three (3) days' notice of their selection for a given racing program, while thoroughbred horses are selected with but one (1) day's notice. Therefore, the forty-eight hour rule against administration of medication can only be applied to harness racing horses. Moreover, harness racing horses are brought into the paddock, which he claims to be a secured area under State supervision (overlooking the fact that State officials as well as race track employees have access to these animals as well as their trainers) on the day of the race (without detailing the number of hours prior to the race they are brought there), at which time pre-race blood analyses are taken of the animals to check for improper medication. Mr. Dailey recites that thoroughbred horses are "too skittish" to be kept in a paddock together for any length of time and so, are brought there on the immediate eve of the race, with no time for pre-race blood testing. (Post race urine tests are conducted on thoroughbred and harness horses and are more sensitive than blood tests.) He further states that "while it is possible for a drug not to be detected by a pre-race test, in harness racing the probabilities are stronger that if a post-race test uncovers drugs in a horse's blood or urine it is the result of an attempted fraud." (35a).

JOSEPH A. FARALDO submitted an affidavit in reply to the affidavit of Mr. Dailey, reciting that "what John Barchi received was Notice of Suspension effective immediately with the so called 'right' to file a Notice of Appeal within ten (10) days." (36a) Had he availed himself of that right, without the necessary stay, by the time an administrative appeal would be scheduled and a decision made, the fifteen (15) day suspension would have been served and the issue become moot, which is what invariably happens. That is the reason why, in April of 1976, of five (5) harness racing trainers suspended none availed

themselves of the so-called right to an administrative review. No adequate meaningful administrative remedy was ever available to them, or their predecessors. (37a).

Mr. Faraldo further pointed out that "BE ALERT" was given a pre-race blood test in the paddock by officials of the Board, which proved negative. He stated that during the three or four hour period that this horse was in the paddock, he was subject to intense security supervised by officials of the Board, concluding "that from this fact the State of New York is as responsible a party if not more so, than they claim John Barchi to be." (38a).

An affidavit was submitted by Lucien Fontaine, a harness racing driver. In 1962 in Pennsylvania, under color of similar administrative rules, he was suspended for ninety (90) days when a horse trained by him came up "positive" for a prohibited drug, allegedly administered within forty-eight hours of a race. He remained under suspension for sixty-three (63) days, the earliest time the Board could schedule a hearing. As a result, nineteen (19) of the twenty-three (23) horses under his training tutelage were lost from his stable forever, since the owners of the horses made arrangements with different trainers during the period of suspension, so that the horses would not miss racing opportunities because of Fontaine's unavailability, which arrangements became permanent. Indeed, the only four (4) horses that were not lost to other trainers during and after the suspension was served, were his own. His business was ruined. As a result, he no longer trains harness racing horses, limiting himself to driving, in view of the arbitrary power of the racing boards to destroy his business, based on no more than mere charges and without a prior hearing to determine culpability. In 1975, Fontaine received a five day suspension on a charge of a driving infraction. By the time his hearing was scheduled, he had served the suspension. He was ultimately exonerated of the charges, but there was no remedy for him to recover his loss of income. (39a-40a)

The amended complaint herein contains three causes of action. The first count challenges the Constitutionality of Section 8022 of the Unconsolidated Laws of the State of New York, for authorizing the suspension of a harness racing licensee without a prior hearing. The second count challenges the Constitutionality of the same section based upon a denial of Equal Protection of Law, by reason of the availability of an administrative stay of suspension pursuant to Section 7915 of the Unconsolidated Laws for a thoroughbred racing licensee under suspension, pending a hearing, while such remedy is statutorily prohibited and factually denied a harness racing licensee. The third count challenges the Constitutionality of the administrative presumption that the trainer of harness racing horses found to be medicated within forty-eight hours of a race is either guilty of intentional fraud or negligence in causing such condition to exist, when there is no rational connection for such conclusion, especially where racing officials among others, have just as much access to the animal as does his trainer during the crtical period.

On the 23rd day of December, 1976, District Court Judge Gerard L. Goettel convened a three judge Court to determine the Constitutionality of Section 8022 of the Unconsolidated Laws and the Trainer's Responsibility Rule, administratively promulgated. (JS23a) On the 18th day of August, 1977, a three judge court declared Section 8022 of the Unconsolidated Laws of the State of New York to be Unconstitutional but upheld the Constitutionality of the Trainer's Responsibility Rule. (JS3a) A judgment was entered on the 15th day of September, 1977 declaring the fifteen (15) day suspension imposed upon Appellee to be null and void. Appellants served and filed Notice of Appeal and probable jurisdiction was noted by this Court on the 20th day of March, 1978.

POINT ONE

THE NATURE OF THE PRIVATE INTEREST IN EARNING A LIVELIHOOD IS SO GREAT THAT DUE PROCESS OF LAW IS VIOLATED BY SUSPENSION OF SUCH RIGHT PRIOR TO AN ADMINISTRATIVE HEARING, WHERE THERE IS NO REMEDY FOR RECOUPMENT OF LOSSES SHOULD A SUMMARY SUSPENSION PROVE TO BE ERRONEOUS.

Certain private interests are so inherently sacred, that they may not be infringed, without the most sensitive safeguards of due process of law. They include not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of conscience, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness. *Meyer v. Nebraska,* 262 U.S. 43 (1923).

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments.

Essentially, the appellee was deprived of his liberty and property without the constraints imposed by procedural due process. His property being his employment; his liberty being his freedom to practice and continue in his chosen profession. These rights come within the meaning of the liberty and property concepts of the Fourteenth Amendment. The State does not contend that procedural due process is inapplicable to terminations or suspensions of the license herein issued, as has been implicit in many

prior decisions of this Court, e.g. *Vlandis v. Kline,* 412 U.S. 441 (1973); *Goss v. Lopez,* 419 U.S. 565 (1975); *Bell v. Burson,* 402 U.S. 535 (1971); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Slochower v. Board of Higher Education,* 350 U.S. 551 (1956); *Board of Regents v. Roth,* 408 U.S. 564 (1972).

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell,* 418 U.S. 539 (1974). The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society *Joint Anti-Facist Comm. v. McGrath,* 341 U.S. 123 (1951).

Due process, unlike some legal rules is not a technical concept with a fixed content unrelated to time, place, and circumstances. *Cafeteria Workers v. McElroy,* 367 U.S. 886, (1961). Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer,* 408 U.S. 471 (1972). The fundamental requirement of due process therefore being the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

Appellant would have this Court hold that the interest represented by Appellee's uninterrupted enjoyment of his license, when balanced against the governmental interest sought to be protected by the summary suspension procedure embodied in section 8022, mandates that the statutory procedure be found constitutionally permissible. The State urges that to insure the public of the integrity of the racing industry, it must be granted the ability to act summarily. It points to the substantial revenue derived from racing and suggests that its inability to act promptly

when presented with potential racing violations could impair its revenue base. However, there is no proof in the record before this Court that revenues have in this case been affected where the State has been forced to stay a suspension pending an administrative hearing. Nor is there any other factual evidence presented showing a positive correlation between the amount of revenue derived and the procedural treatment of racing violations. Against this theoretical injury which might or might not come to pass, must be balanced the real injury posed to the licensee by a summary suspension of his license, as well as the probability that the findings upon which the suspension is based are later, at a plenary hearing, shown to be erroneous.

Whether due process requires an administrative hearing prior to license suspension depends upon a balancing of three factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge,* 424 U.S. 319, 334-35, (1976) (Citations omitted).

The interest secured to Appellee by his license is his right to earn a livelihood within the State of New York. But for the continued vitality of his license, Appellee would be denied the right to train harness horses entered in contests on racetracks within the State. Suspension of Ap-

pellee's license, such as the fifteen (15) day suspension herein sought to be imposed, can so seriously impede the licensee's ability to earn a livelihood as to amount to an irrevocable forfeiture. For, as set forth in Appellee's affidavit (p. 25a et. seq.) the horses entrusted to his care cannot compete in races without a trainer for even a short period. The owners, during the licensee's suspension must make provision for competitor trainers to take over the care of the animal, as there cannot be even a short hiatus in the routine and care of the horse. Oftimes such owners do not return to the original trainer but continue with the alternate since frequent changes in trainers, and hence in training techniques utilized, can adversely affect the animal. The suspension so imposed thereby causes an irrevocable loss in clientele. Additionally, such suspension carrying with it of guilt, deters potential clients from utilizing the services of the trainer.* The loss of clientele and the loss of earnings from purse moneys can neither be evaluated nor recouped. There is no statutory provision nor common law remedy which permits a trainer erroneously deprived of his license to recover these monies from the State. The loss of revenue and irrevocable impairment to the trainer's reputation is the type of protected interest which this Court has consistently held requires license suspension to be preceded by a meaningful opportunity to be heard and to refute the charges levied.

The right to earn a livelihood is so fundamental it requires sensitive due process considerations. While a government employee may be suspended from his employ-

*Most importantly, no horse for which the licensee is the trainer of record may be entered in a race during the period of license suspension. (29a) The trainer is thereby absolutely divested of his shares of the purse money which might have been earned by those of his horses placing first through fifth in races, but for the suspension (25a).

ment prior to a full evidentiary hearing, since vindication brings with it restitution of back pay. Even there, the procedures provided include notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. *Arnett v. Kennedy,* 416 U.S. 134, 142 (1974). Only where restitution can be assured should a subsequent hearing prove a suspension to be erroneous, will the Fourteenth Amendment tolerate less than a full evidentiary type hearing where the right to earn a livelihood is at stake.

As Judge Friendly has written, when the State seeks "to deprive a person of a way of life to which he has devoted years of preparation and on which he and his family have come to rely," it should be required first to provide a "high level of procedural protection."[8]

In the case at bar, John Barchi was merely notified of the charge that a horse entrusted to his care had shown the presence of "Lasix" in its system, allegedly administered within forty-eight hours of a race on June 22, 1976 (29a). This "finding" was purportedly based on tests conducted on a urine sample asserted to have been taken from the horse "BE ALERT," after the race. Appellee was never shown the results of the testing, he was not informed as to the identity of the lab or persons who conducted the test; the chain of custody of the urine sample from the time it was taken until the time it was received by the lab was not explained; and the conditions under which the test was conducted, as well as the nature of the test performed, were not explained. The risk of an erroneous finding is patent. With no opportunity afforded to contest or even force disclosure of the accuracy of the testing procedure used, of the chain of custody of the urine sample, of the means used to transport the sample or the procedure used

8. Note: Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1296-1297 (1975) (revocation of professional licenses).

in handling it, or whether or not the sample had even been drawn from "Be Alert." More importantly, the "finding" is in fact founded upon an inference that the results of the testing presumptively establish the injection of the drug within a forty-eight hour period prior to the race. At no point was Appellee ever shown or given the opportunity to contest the inference so established, allegedly founded upon chemical expertise. The "findings" upon which Barchi's license was to be summarily suspended for a fifteen (15) day period represents a conclusion drawn from evidence never revealed.

> "Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . " "Secrecy is not congenial to truth seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Anti-Fascist Comm. v. McGrath,* supra. at 170, 171-172, (Frankfurter, J. concurring).

Due process has required that a prior hearing is necessary to suspend a student from public school for disciplinary reasons. *Goss v. Lopez,* 419 U.S. 565 (1975). The right to earn a livelihood is deserving of more sensitive treatment.

Appellants have suggested no case, where the right to earn a livelihood, has been curtailed, without a prior evidentiary hearing, with Constitutional approval unless a provision for restitution is woven into the statutory scheme. Indeed, it would be unthinkable to suggest that the license of a lawyer could be suspended without prior notice of charges and opportunity for a hearing to defend himself. *In re Ruffalo,* 390 U.S. 544 (1968); *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1956), Section 90

(6),[9] New York State Judiciary Law. Nor may the license of a physician be suspended without the same prior due process safeguards. Section 6510, Education Law.[10] Although Appellants seem to try to justify their insistence upon the right to summarily deprive licensees under their jurisdiction, by virtue of public interest, it is doubtful that a harness racing trainer, disserves the public welfare to a greater extent than a lawyer, physician or other professional accused by their licensing authorities of wrongdo-

9. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges.

10. *§6510. Proceedings in cases of professional misconduct*

In cases of professional misconduct the proceedings shall consist of (1) prehearing procedures by the education department, (2) hearing procedures by the committee on professional conduct for the particular profession, (3) decision procedures by the board of regents, and (4) review procedures by the appellate division of the third judicial department, as follows:

1. Prehearing procedures.

a. Complaint. A complaint of a licensee's professional misconduct may be made by any person to the education department.

b. Investigation. The department shall investigate each complaint and if the department and the committee on professional conduct for the particular profession decide that a hearing is warranted, the department shall request the attorney general to prepare the charges.

c. Charges. Upon such request the attorney general shall prepare the charges if he decides that a hearing is warranted. The charges shall state the alleged professional misconduct and shall state concisely the material facts but not the evidence by which the charges are to be proved.

ing. Yet, in the case of the latter professions, the right to a hearing prior to license suspension or revocation is so ingrained into our system of due process of law, that no case has been discovered where an attempt has been made to deprive such professional of his livelihood without a prior hearing. It is submitted that a doctor or lawyer or other professional accused of some wrongdoing is a graver threat to the welfare of the community than a race horse trainer, who allegedly violates an administrative regulation.

Every argument offered by Appellants to try to justify their claimed right to economic life and death over their licensees must fall with careful analysis. The sequence of the suspension of Appellee contradicted any claim by the New York State Racing & Wagering Board to a need for emergency power. The suspension merely assuaged the frustration of an administrative agency that could not solve a mystery by secret proceedings, and therefore, desperately reached out for a scapegoat.

On June 22nd of 1976, "BE ALERT", the horse trained by Appellee, placed second in the third race at

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d. Notice of hearing. The department shall set the time and place of the hearing and shall prepare the notice of hearing. The notice of hearing shall state (1) the time and place of the hearing, (2) that the licensee may file a written answer to the charges prior to the hearing, (3) that the licensee shall appear personally at the hearing and may be represented by counsel, (4) that the licensee shall have the right to produce witnesses and evidence in his behalf, to cross-examine witnesses and examine evidence produced against him, and to have subpoenas issued in his behalf to require the production of witnesses and evidence in manner and form as prescribed by the civil practice law and rules, (5) that a stenographic record of the hearing will be made, and (6) such other information as may be considered appropriate by the department.

(e) Service of charges and of notice of hearing. A copy of the charges and the notice of hearing shall be served on the licensee personally by the department at least fifteen days before the hearing. If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served by registered mail to the licensee's last known address by the department at least twenty days before the hearing.

Monticello Raceway. Two days later, on June 24th, Appellee was given oral notice by John F. Fay that a urine test of the horse indicated the presence of the drug "Lasix" in violation of the Rules of Appellant that prohibits treatment with any drug or medicant within forty-eight hours of a race. Appellee insisted that he knew nothing about the incident and on the 28th day of June, 1976, at his own expense, he engaged a private lie detection laboratory, making the written report available to Appellant, to wit; findings that he had spoken truthfully when he denied any knowledge of the occurrence. The next day, Appellants requested Appellee take a lie detector test administered by Appellant, which he did, with another result favorable to Appellee.

On July 10, 1976, a full eighteen (18) days after the race, that had undoubtedly been forgotten by those who attended the event, Appellants decided to suspend Appellee. The explanation for the eighteen (18) day delay is set forth in the affidavit of its counsel, John M. Dailey:

> "In Barchi's case, an unsuccessful attempt had been made to determine the actual party responsible for drugging his horse. When this proved impossible, Barchi was suspended on the basis of his trainer's responsibility. . . . Immediate action was necessary in view of the (need) to protect the integrity and reputation of the sport and to insure public confidence." (33a)

The difficulty is that "immediate action" was not taken in this case. Why Appellants could not have commissioned a hearing officer to try the issues and/or defer execution of punishment until a final administrative decision was made, is difficult to comprehend. And why the need to rush to judgment is likewise difficult to comprehend. It is submitted that the suspension of Appellee was not an exercise of emergency action to serve the public, but rather the exercise of peremptory power to vindicate the om-

nipotence of an administrative agency. No one is served by secret proceedings which bear an exceptionally high risk of erroneous deprivation.

It must be stressed that there should be no inference of negligence on the part of Appellee that can be rationally drawn from the improper medicating of a horse. Before a licensee should be presumed liable for negligence for improper tampering with a horse, provisions should be made to afford him the right to exclude everyone else from the barn and the paddock, where his horses are housed within the so called forty-eight hour prohibited period.

Racing officials and employees of the track, as well as other owners, trainers and grooms, all have free access to the barns and to the paddock. Appellee should not be held responsible since he does not enjoy any authority nor ability to exclude them.

Oftentimes, even members of the public enjoy free access privileges. The affidavit of John Barchi points out that a trainer cannot rationally be presumed liable for negligence where there has been tampering with the horse, when so many people have free access to the animal. (27a).

It must also be stressed, that the rules[11] do not prohibit the use of lasix on a horse, but only its use within forty eight hours of the race. Thus, a hearing would not be the pro forma plea for leniency as in *Dixon v. Love,* 431 U.S. 105 (1977), where a license suspension was based upon a designated number of traffic infractions, within a specific period of time, all of which were tested or could have been tested, at a trial. The Court wrote in *Dixon:*

> "Since appellee does not dispute the factual basis for the Secretary's decision, he is really asserting the right to appear in person only to argue that the secretary should show leniency and depart from his own regulations. Such an appearance might make the licensee feel that he has received more personal attention, but it would not serve to protect any substantive rights." (at p. 113-4)

11. See 4120.4(d) at 2 supra.

In the case at bar, a hearing would put in issue the charges against Appellee, which he has loudly denied.

It was this type of distinction that impelled the *Dixon* Court to point out the risk of an erroneous deprivation in the absence of a prior hearing there, was not great.

In the case at bar, the risks of an erroneous and devastating deprivation outlined above are coupled to a right so vital and essential that the circumstances cannot justify the curtailment of a very high level of procedural protection.

While in *Dixon,* the Court took pains to point out that the right to drive a motor vehicle for pleasure is not so great that it may not be revoked or suspended without a hearing, recognizing the provision in the Illinois regulatory scheme for a limited license for those who must drive in order to gain their livelihood:

> "Unlike the social security recipients in *Eldridge (Matthews v. Eldridge,* 424 U.S. 319, 1976), who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated. On the other hand, a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence. . . . The Illinois statute includes special provisions for hardship and for holders of commercial licenses, who are most likely to be affected by the deprival of driving privileges. . . . We therefore conclude that the nature of the private interest here is not so great as to require us to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." (at p. 113)

The right to earn a livelihood is so "vital and essential" that the only possible justification for its curtailment prior to a hearing, would be under circumstances providing for restitution. However, since such restitution is not available for a trainer, his license should not be suspended with less than the safeguard of a prior hearing.

Indeed, the loss of perspective of Appellants is best reflected upon their reliance upon *Ingraham v. Wright,* 430 U.S. 651 (1977), a case in which this Court held that the Constitutional right involved was not so great, as to require a hearing prior to the infliction of reasonable corporal punishment upon a student. The Court again outlined the test that must be applied to determine whether the Constitutional right claimed requires a hearing prior to any infringement:

> "Whether in this case the common law remedies for excessive corporal punishment constitute due process of law must turn on an analysis of the competing interests at stake, viewed against the background of 'history, reason, [and] the past course of decisions.' The analysis requires consideration of three distinct factors: 'first, the private interest that will be affected . . . second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards, and finally, the state interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (at p. 675)

It is of significance to note that New York law does require a hearing subsequent to the imposition of a suspension upon a licensee but without any provision for a stay until final decision. Yet, Appellant has shown no valid or real reason why such hearing cannot precede disciplinary action. The interest advanced by the government, that of insuring the integrity of the industry, is not diminished, for they retain the power to discipline those found to have violated the appropriate rules of racing, after a hearing.

To protect the integrity of racing, the same administrative machinery already available can provide a prompt hearing and determination. Therefore, there are no real burdens to be placed upon the State in requiring a pre-suspension hearing. The claim of Appellants to a need for summary suspension powers is without merit and is illusory. In the case of violations of the rule against medicating a horse within forty-eight hours of a race, it takes from two to three days for a laboratory report, so that spontaneous suspensions rarely, if ever, are imposed. Indeed, by the time a suspension is usually effected, the race that gave rise to it, has long been forgotten by the public. It is respectfully submitted that the anachronistic power of economic life and death over its licensees to which Appellants have stated such heated claim, serves no more than the political perogative of the official hierarchy that rules the racing industry with an iron hand.

In *Morrissey v. Brewer,* 408 U.S. 471 (1972), in measuring the quantity of due process required for parolees charged with violation of the terms of their conditional release from incarceration, this Court, while requiring a preliminary hearing to determine probable cause for their arrest, did not criticize the sequence of first taking a parolee into custody prior to the required due process hearing machinery. However, the rights of a parolee are limited, having been afforded the privilege of conditional release under strict supervision from incarceration, prior to the termination of his sentence. For Appellants to seek to equate the quantity and quality of due process afforded to convicted criminals with that which they advocate for their licensees only reflects their unhealthy attitude that horse racing licensees are little more than criminals whose

rights to earn a living are not entitled to the same protection as licensees in other professions and occupations.

Indeed, this Court has held that a prior hearing on the issue of liability is essential even where the right involved is not entitled to the same degree of protection as the right to earn a livelihood, as in the case at bar. Thus, the Georgia statutory scheme for revocation of a driver's license of a driver involved in an accident, who fails to post a bond to secure recovery of an eventual judgment by the party injured, was held to be Unconstitutional, where there was no opportunity for the licensee to litigate prior to revocation, the issue whether there was probable cause to believe that he was liable for the accident and thus, might in fact be called upon to respond in damages. "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. . . . This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' . . . Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his license the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing. . . . It is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective." *Bell v. Burson,* 402 U.S. 535, 539, 541, 542 (1971). Appellants have failed to make

any showing of a continuous emergency eighteen (18) days after the incident charged to Appellee that required a summary suspension of his right to earn a livelihood, without a prior hearing to determine whether he was guilty of misconduct to justify such drastic action.

In circumstances more akin to these, this Court has required a full evidentiary hearing prior to the drastic and devastating termination of benefits to needy individuals. *Goldberg v. Kelly,* 397 U.S. 254 (1970). Yet while the machinery already exists to adequately provide such procedural safeguards, the State stubbornly insists that they not be made available until a point in time when they are meaningless and further that draconian administrative power is absolutely essential. In *Hubel v. West Virginia Racing Commission,* 513 F.2d 240 (4th Circ., 1975) the Court did not take into account the States that require a hearing before license suspension, where horse racing nevertheless prospers. Thus, there is no necessity for the drastic summary procedures assumed by Appellants. Absent a proven necessity, due process is violated by punishment without opportunity for a prior hearing. The plea of Appellants is unworthy of serious consideration.

In *Ruane v. New York Racing and Wagering Board,* 532 F.2d 860 (2nd Circ., 1976), where the Court upheld small fines levied against licensees prior to a hearing, it must be noted that the parties did have an adequate remedy at law, to wit, restitution should a subsequent hearing vindicate them. Moreover, *Ruane* must be distinguished in that the fines imposed did not impair the rights of the licensees to earn a livelihood.

In, *Cafeteria and Restaurant Workers Union v. McElroy, supra,* this Court took great pains to point out that the right to earn a livelihood was not at stake.

> "All that was denied her was the opportunity to work at one isolated and specific military installation." Moreover,

> the governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment." (at 895-96) . . . "There is nothing to indicate that this determination would in any way impair Rachel Browner's employment opportunities anywhere else (at 898-899)."

The suspension of Appellee bars him from working as a competing trainer anywhere in the United States or Canada and thus in that sense is an important factor which significantly distinguishes the situation at bar from that presented in *Cafeteria Workers.*

It has never been seriously urged by Appellants that Appellee is not entitled to a hearing on the charges of misconduct against him, but rather, it is their position that a hearing subsequent to the imposition of his suspension satisfies due process of law. Where important Constitutional rights are at stake—and the right to earn a livelihood has never been challenged as one of them—opportunity for a hearing subsequent to the impairment of the right has never been held to be Constitutionally sufficient. To support such proposition, Appellants would have this Court accept a presumption that all licensees in the racing industry charged with misconduct, are guilty—a presumption that is unsupported by any rational connection and is Constitutionally repulsive. *Stanley v. Illinois,* 405 U.S. 645 (1972); *Armstrong v. Manzo, supra.*

Appellant refers to *Gilmour v. New York State Racing & Wagering Board,* 405 F. Supp. 458 (S.D.N.Y., 1975), in urging that appellee was afforded "some kind of hearing" when summoned before Presiding Steward Fay and given notice of the charges against him, which should satisfy due process of law, within the meaning of Gilmour.

However, in the *Gilmour* case, the licensee had been suspended by the race track, not the NYSRWB, as the title of the action might indicate. The Court upheld the suspension, but based upon a breach of contract by Gilmour. Gilmour had agreed to cooperate in any investigations concerning wrongdoing at the tracks, in consideration for being permitted to race there. However, he allegedly failed to follow through on his agreement. Indeed, *Gilmour* was given notice of his reticence and race track officials confronted him with his failure to do what he had promised. He had full opportunity to confront his accusers and to offer evidence on his behalf, albeit informally. This must be contrasted from Appellee's situation, where what he was given by the Presiding Steward was not "some kind of hearing," but rather only "some kind of notice," of the charges against him. He was never confronted with the laboratory samples, nor given opportunity to challenge the accuracy of the testing or even the accuracy of the claim that the sample was, in fact, obtained from the urine of "Be Alert." Nor was he given opportunity to demonstrate that he did not have exclusive control of the horse. In short, it is important that any impression that Appellant has sought to create that Appellee might have been given "some kind of hearing" is dispelled. Moreover, it must be carefully noted that there was no emergency to justify summary suspension, since Appellee was not suspended until a full eighteen (18) days after the event.

In a companion case, *Daigneault v. Sarafan,* 76 Civ. 3698 G.L.G., S.D.N.Y., Sept. 9, 1976, the plaintiff had declined a hearing that had been offered to him prior to the institution of his lawsuit for two reasons. The fact was that the offer of a hearing was in the face of a refusal of a stay. Since the Board has thirty (30) days to render a decision, and additionally has the requirement of transcript

availability prior to decision making, Daigneault would have served his suspension before the administrative review process would have run its course. Secondly, Daigneault was charged with a violation of Rule 4117.4(p)[12] of the Rules of the New York State Racing & Wagering Board, authorizing punishment for a licensee accused of "driving with indifference." The vagueness of the rule and the charge rendered it almost impossible to defend and so, Daigneault elected to challenge the Constitutionality of the rule. Any impression that Appellant has sought to make that administrative stays pending administrative review will invariably be granted, where there is reasonable grounds to issue one, must be dispelled by *Manzi v. Barry,* 77 Civ. 4680 HFW S.D.N.Y., where these same Appellants argued that the issuance of a stay of suspension is prohibited by Section 8022. When Judge Werker followed *Barchi v. Sarafan,* 436 F. Supp. 775 (S.D.N.Y., 1977), and stayed the enforcement of a suspension issued without a prior hearing, Appellant moved the United States Court of Appeals for a stay of the order of the Court below pending Appellate review, on grounds that Section 8022 of the Unconsolidated Laws of the State of New York prohibits a stay of suspension pending an administrative hearing, which application was denied on September 30, 1977. It therefore ill behooves Appellant to suggest in this Court that it does not follow Section 8022 to the letter, when the very reason for this litigation is that it has done so in Appellee's case and invariably does so in all cases.

It is finally submitted that the vitality of *Hubel v. West Virginia Racing Comm., supra,* has been exhausted by the subsequent decision of *Matthews v. Eldridge,*

12. 9 NYCRR 4117.4(P) Racing Violations. The following shall be deemed racing infractions: (p) Driving with indifference or lack of effort.

supra. The *Hubel* decision turned on State interest in summary execution of its suspension powers, without taking into account any of the other criteria enunciated in *Mathews.*

In *Hubel,* the Court failed to take into account the Constitutional importance of the private interest in the right to earn a livelihood involved and "the risk of an erroneous deprivation of such interest," to wit, the irreparable injury resulting from an erroneous decision to summarily suspend a licensee. In short, the doctrine of *Matthews,* coupled with the practicalities of racing, clearly indicate that the State interest can be served by delaying the imposition of a suspension or revocation until a hearing be afforded a licensee. Indeed, the solution is promptness in the hearing and decision process, rather than the hasty imposition of punishment, without proper consideration.

In *Tappis v. New York State Racing & Wagering Board,* 36 N.Y.2d 862 (1975), the New York Court of Appeals upheld the procedures provided by Section 8022. The Court indicated that public policy required such summary power in the hands of the racing authority to maintain the integrity of the sport. However, in *Gerard v. Barry,* 59 A.D.2d 901 (2nd Dept., 1978), the Appellate Division, Second Department upheld the ruling of Nassau County Supreme Court, which followed *sub nom. Barchi v. Sarafan,* 436 F.Supp. 775 (S.D.N.Y. 1977), by declaring the suspension of a licensee without a prior hearing violative of due process of law. Appellant has urged that the Appellate Division, Second Department was in error, in reaching the conclusion it did, pointing out that an application was pending for leave to appeal to the New York Court of Appeals. Since preparation of Appellant's brief, the New York Court of Appeals denied such requested leave to appeal. It would therefore seem that the

New York Court of Appeals has overruled *Tappis* based upon *Barchi*, leaving Appellant with a specious argument that State Law should be upheld, which now seems to have been repudiated by State Courts, relying upon the decision below, now under appeal herein.

POINT TWO

SECTION 8022 OF THE UNCONSOLIDATED LAWS ALSO VIOLATES EQUAL PROTECTION OF LAW BY PROHIBITING STAYS OF SUSPENSIONS FOR HARNESS RACING LICENSEES PENDING ADMINISTRATIVE REVIEW THAT ARE NOT PROHIBITED TO THOROUGHBRED RACING LICENSEES

Both Harness Racing and Thoroughbred Racing fall within the supervising jurisdiction of the NYSRWB. However, unlike, Section 8022 of the Unconsolidated Laws of the State of New York, Section 7915 of the Unconsolidated Laws, the statute that outlines the procedure for thoroughbred license revocation or suspension, does not restrict the issuance of stays of punishment, pending administrative review. Section 8022 is substantially identical to 7915, excepting the absence in the latter of prohibition of stays of execution of suspensions and revocations pending review. (J.S. 17a). The comparative language of the two statutes is clear and unambiguous requiring no State court interpretation for construction. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964); *Carey v. Sugar,* 425 U.S. 73 (1976).

Appellant has vaciliated between two "unique" explanations to attempt to justify the difference in procedure for the two classes of licensees, albeit in the racing industry. *Barchi v. Sarafan,* 436 F.Supp. 775 (S.D.N.Y.

1977). In the Court below, appellants took the position that there is more corruption in harness racing than thoroughbred racing and therefore, the State legislature was justified in applying more draconian punishment procedures in regard to its regulation. However, Appellants were doomed to fail in any effort to try to prove the scandalous accusation, which apparently is symptomatic of their contempt for those who earn their livelihood in harness racing. The Court below noted that the defendants had not come forward with any proof concerning their bare assertion of greater corruption in harness racing to justify the need for the difference in treatment effected by Sections 7915 and 8022 (J.S. 18a). An isolated instance of labor trouble cited by Appellant does not support an inference of wholesale corruption in the harness racing industry. Even had the Court below accepted the unsupported assertion of greater corruption, there was no proof that the availability of summary proceedings could better control the probabilities of corruption.

> A legislative classification must contribute substantially to the achievement of the state's purpose. . . . [G]rossly overinclusive or underinclusive classifications should not readily be tolerated. Nor should a reviewing court defer to imaginable facts that might justify the classification. But account should be taken of legislative realities and the need for legislative flexibility. In short, a legislature should be able to adopt any means that are reasonably effective in achieving a valid legislative end or ends. *Boraas v. Village of Belle Terre,* 476 F.2d 806, 821-22 (2 Cir. 1973)(dissenting opinion), *rev'd,* 416 U.S. 1, (1974).

Appellants now urge that this Court need not reach the Equal Protection claim, since they have elected to disregard the prohibition in Section 8022 and at times will grant a stay of execution of punishment, pending ad-

ministrative review. Research has failed to disclose any precedent for State officials to urge this Court to avoid reaching a decision on the Constitutionality of the State statute by making a claim that they sometimes ignore the command of the enactment anyway and therefore, judicial energies should not be expended in reviewing the enactment. It is strongly submitted that the position of Appellants is less than sincere. Otherwise, they would pose no objection to the declaration of the unconstitutionality of the prohibition that they grudgingly concede in this Court is unconstitutional, coupled with a plea that it not be nullified to undoubtedly maintain it in its arsenal of administrative weaponry to be applied where it deems necessary.

In any event, it is undisputed that Section 8022 has been applied against Appellee, who has not been given a stay, pending administrative review, and therefore, he has standing to challenge a State procedure that denies him, because of his membership in a specific class, equal protection of law. *Brown v. Board of Education,* 347 U.S. 483 (1954).

The Equal Protection Clause necessarily limits the authority of a State to draw such legal lines as it chooses. *Stanley v. Illinois,* 405 U.S. 645 (1972). This is not to say that the State may not create classifications for differing treatment, where it can support its decision with a rational basis. *Boraas v. Village of Belle Terre,* 416 U.S. 1 (1974).

It is not the province of this Court to create substantive Constitutional rights in the name of guaranteeing equal protection of the laws. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). However, the right to pursue an occupation is a fundamental Constitutional right, a proposition with which no serious quarrel can be anticipated. *Meyer v. Nebraska, supra.* Therefore, to single out one class of an occupational

phylum and to legislate a prohibition of the right of members of the class to pursue their occupation when charges of administrative violation are leveled against its members and prior to a hearing, while freeing a second class of the same phylum from such unduly harsh treatment is a violation of the Equal Protection Clause of the Fourteenth Amendment, unless the State can carry a heavy burden to justify such disparate treatment. Here the State has failed to make any effort to meet its burden. (J.S. 18a-19a).

The right to earn a livelihood cannot be classed as insubstantial. *Montayne v. Haymes,* 427 U.S. 236 (1975).

If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. ". . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Dandridge v. Williams,* 397 U.S. 471 (1970). However, for the State to seek to justify disparate procedures adopted for two classes of horse racing licensees by first making an irresponsible and unsupported claim that the class treated more harshly has been traditionally more corrupt, and then when put to the test, being unable to offer proof in support of so scandalous an accusation, now urges that the statute is often not followed, merely adds substance to the argument of Appellee. As pointed out, he has standing to challenge the disparate treatment authorized by the Legislature, since he has been a victim of the arbitrariness by the denial of a stay, pending an administrative hearing on the charges lodged against him. To urge that the challenged statutory discrimination should be upheld because it is *often* disregarded, is to advocate a strange rule of law that would neutralize *any* Equal Protection of

Law challenge. Therefore, the test to be applied in evaluating the equal protection claim is whether or not the classification has a reasonable basis. *Shapiro v. Thompson,* 394 U.S. 618 (1969). It is strongly urged that Appellants have failed to even attempt to prove a "rational connection" for the legislative election to treat harness racing licensees more harshly than their counterparts in the thoroughbred racing industry, and therefore, the sustantive distinction created by the legislature violates Equal Protection of Law. *Allen v. County Court, Ulster County,* 568 F.2d 998 (2nd Circ., 1977).

The denial of stays pending review in harness racing constitutes a denial to Appellee of Equal Protection of Law.

POINT THREE

THE TRAINER'S RESPONSIBILITY LAW VIOLATES DUE PROCESS OF LAW BY REASON OF THE LACK OF RATIONAL CONNECTION BETWEEN THE ABSOLUTE RESPONSIBILITY IMPOSED UPON A TRAINER AND MISCONDUCT —WHETHER BY WAY OF INTENTIONAL WRONGDOING OR NEGLIGENCE—TO BE INFERRED FROM THE DRUGGING OF A HORSE.

In striking down Section 8022 of the Unconsolidated Laws of the State of New York as unconstitutional, the three judge Court below, nevertheless found that the "Trainer's Responsibility Law" is constitutional and the presumption that it creates does not offend Due Process of Law:

> "The Court finds that the duty of a trainer to oversee his horses is sufficiently connected to the occurrence of

> tampering to support the presumption established by the trainer's 'insurer' rules. The state's definition of trainer responsibility is reasonably related to the interests involved and, given the rebuttable nature of the 4120.5 presumption, the high standard of accountability is not unconstitutional. Whether the application of the rules in plaintiff's case was constitutionally proper is not a matter we need consider in light of the absence of an opportunity for meaningful administrative review." (J.S. 20-21a).

Appellants have merely addressed themselves to the issues created by the declaration of the unconstitutionality of Section 8022, without attempting to support the three judge Court's decision to uphold the constitutionality of Rule 4120.5, despite the fact that the appeal taken by Appellants brings before this Court the ruling of the three judge Court upholding the constitutionality of the Trainer's Responsibility Rule.

Appellee has standing to challenge the ruling of the Court below, where prejudicial to him, since he is in jeopardy that the Trainer's Responsibility Rule, will be applied against him at an administrative hearing. Under such circumstances, the decision of the Court below upholding this administrative rule should be reviewed by this Court. *California v. LaRue,* 409 U.S. 109 (1972). The viability of the regulation calls for judicial pronouncement, lest the silence of this Court be misconstrued as approval of the three judge Court ruling, thereby unnecessarily running the risk of confusion in its application. *Bellotti v. Baird,* 428 U.S. 132 (1977).

It is possible that the presumption might be acceptable were the maximum penalty exposure a small fine. However, where there is a possibility of license suspension or revocation in its application which will cause irreparable damage, such type presumption must pass a rigid test of constitutionality to determine whether there is

a rational connection between the proven fact and the conclusion required by law to be drawn therefrom.

The purpose of the Trainer's Responsibility Rule is to insure the integrity of racing through the harsh device of imposing liability upon the trainer, without proof of fault, to assure that no medications are administered to the animal within forty-eight hours of the race. The Rule comes too close to imposing absolute liability as an insurer upon a trainer. The burden, however, is unacceptable in a quasi-criminal regulation, the violation of which carries with it the draconian possibility of the party to be charged being barred from earning a livelihood in his chosen occupation. In *Re Ruffalo,* 390 U.S. 544 (1968). In *People v. Fitzpatrick,* 32 N.Y. 2d 17 (1973), the New York Court of Appeals offered the suggestion that some presumptions serving the convenience of administration may be tolerated where the penalty is minimal; but not where the result can be as dire as in the case at bar, to wit; the loss of one's right to earn a livelihood, by license revocation or suspension.

> "Although no Courts have made the distinctions it would seem that in sustaining legislatively enacted presumptions one must look to counterbalancing factors. It is one thing to have presumptions in crimes punishable by long imprisonment, or even capital punishment. It is another to utilize presumptions on minor crimes and offenses where the policing problem is aggravated and the escape of responsibility by studied ignorance or denial too easy." (at p. 25).

It is submitted, however, that the burden may not be Constitutionally sheltered, absent a rational connection between the conclusion to be drawn from the fact proven, where the consequence may be a license revocation or

suspension, depriving or impairing the licensee's right to earn a livelihood.

The Trainer's Responsibility Rule raises a presumption that the drugging of a horse prior to a race resulted either from the intentional act of wrongdoing by its trainer or as a result of his carelessness guarding the horse entrusted to him. In the affidavit of John M. Dailey, counsel to the New York State Racing & Wagering Board, the latter set forth the basis for the summary suspension of Appellee.

> "In Barchi's case, an unsuccessful attempt had been made to determine the actual party responsible for drugging his horse. When this proved impossible, Barchi was suspended on the basis of his trainer's responsibility." (33a)

In his affidavit sworn to the 1st day of September, 1976, Joseph A. Faraldo answered Mr. Dailey:

> "In the instant case, John Barchi's horse, Be Alert, was given a pre-race blood test in the paddock by officials of the New York State Racing and Wagering Board. This test his horse passed. During the three or four hour period that this horse was in the paddock, he was subject to intense security supervised by the State of New York.
>
> I respectfully submit that from this fact the State of New York is as responsible a party if not more so, than they claim John Barchi to be." (38a)

Undoubtedly, New York State Racing & Wagering Board investigators were unable to determine the responsible party for the drug that was administered to "BE ALERT", by reason of the huge number of people that had access to the barn, as well as the paddock, where "BE ALERT" was kept during the crucial forty-eight hour period that preceded the race. Race track employees and owners, trainers, grooms, even officials from the New

York State Racing & Wagering Board had free access to those areas and unlimited opportunity to administer Lasix to the horse, if such were indeed done, were any of them bent on mischief. More than that, members of the public enjoyed the same access to those areas. They need only enter the premises in the presence of any licensee or with his approval. Thus, there is no real rational connection between the fact to be presumed, to wit; that the trainer of the horse was guilty of either intentional misconduct or negligence from the fact proven, alleged drug presence in the horse's urine. It may well be that the application of the presumption serves the convenience of the administrative agency, but as was held in *Tot v. United States,* 319 U.S. 463 (1943), that is not sufficient. In every case where statutes imposing strict liability have been upheld, such liability was predicated upon proof that the party subjected to such liability was in exclusive control of the agency which caused the injury from which the damage resulted. Barchi did not enjoy such control. The racetrack itself and the New York State Racing & Wagering Board maintain a full time security force that is duty bound to maintain the integrity of the horse, which failed, putting the blame on the Appellee. McKinney's Unconsolidated Laws, Section 8012. For a presumption that has such serious consequences to be upheld, it must be determined by the Court that it is more likely than not, that the fact to be presumed flows smoothly from the fact proven. *Allen v. County Court, Ulster County,* 568 F.2d 998 (2nd Circ., 1977). In *Allen,* the Second Circuit struck down the longstanding New York State presumption of possession of a firearm by each occupant of a vehicle in which it is found, relying strongly upon *United States v. Gainey,* 380 U.S. 63 (1965), where this Court struck down a presumption that presence at a whiskey still supports an inference of possession of the illegal machinery. In each case, the Court noted that presence, under the circumstances, was

not sufficient to support an inference of knowing possession of the prohibited item.

Applying the same reasoning to the case at bar, it is submitted that the easy access of so many classes of persons to racing stock must inevitably lead to a conclusion that the application of the presumption is irrational and unduly harsh and therefore, the Trainer's Responsibility Rule offends due process of law.

Under the police power reasonable requirements may be imposed, no doubt to protect the public, but they may not be arbitrary, and they must bear a real and substantial relation to the protection they purport to thereby serve. Thus, the New York State Racing & Wagering Board has promulgated a rule creating a Constitutionally unacceptable presumption, to wit, that "it shall be presumed" that a drug administered to a horse within 48 hours of a race was done or caused by a person . . . having . . . custody . . . of such horse with the intent thereby to affect the speed or condition of such horse" Rule 4120.5 and that "a trainer is (therefore) responsible for the condition, fitness, equipment and soundness of each horse at the time it is declared to race and thereafter when it starts to race." Rule 4116.11. See, also Rule 4120.6. The rules allow for an inference that a trainer has caused a horse to be drugged, on the mere happenstance of the event, and thereby, produces the irrational and unfair possibility of punishment of the innocent. Although several states have wisely struck down the statutory presumption that imposes the liability of an insurer upon a trainer (*State ex rel Paoli v. Baldwin,* 159 Fla. 165, 1947; *Mohoney v. Byers,* 187 Md. Repr. 81, 1946, *Brennan v. Illinois Racing Board,* 42 Ill. 2d 352, 1969). Other States have upheld the harsh statutory presumption on grounds of compelling State need, in the regulation of horse racing. (*Jamison v. State Racing Comm.,* 84 N.M. 679, 1973, *Sandstrom v. California*

Horse Racing Board, 31 Cal 2d 401, 1948). States such as Illinois, Florida and Maryland have been able to live with horse racing, without Martial Law over horse trainers, as other States *claim* is necessary to protect the public interest. The history of Illinois, Florida and Maryland show such unfair rigidity to be unnecessary. The right to practice a profession or occupation is Constitutionally protected. *Slochower v. Board of Higher Education of New York,* 350 U.S. 551 (1956).

It has been held that a proceeding that will tend to pin a badge of disgrace upon a person, must be cloaked with due process safeguards. *Wisconsin v. Constantineau,* 400 U.S. 433, (1971). The legalization of horse racing cannot be used to label horse trainers second class citizens. Their rights to practice their occupation are no less entitled to protection than any other calling and any statutory scheme that will unfairly tend to revoke the license of the innocent must be resoundly condemned. It is surprising that any administrative agency would wish to abuse its power and promulgate such rules that serve to punish the innocent, upon the mere happening of an event. It is surprising that more states than the three cited have not resoundly struck down such intolerable administrative legislation.

It is interesting to note that one of the earliest cases that upheld the unfair presumption of trainer liability was *State of West Virginia ex rel Morris v. The West Virginia Racing Commission,* 133 W.Va. 179, (1949). The decision turned on the since discredited doctrine that the right to train horses was a privilege, not a right, and therefore, was not entitled to Constitutional protection. Such rationale is no longer workable. *Graham v. Richardson,* 403 U.S. 365 (1971). Mere legislative fiat may not take the place of due process in the determination of issues involving life, liberty or property. *McFarland v. American Sugar Ref. Co.,* 241 U.S. 79 (1915)

State legislation declaring that proof of one fact or a group of facts shall constitute a prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. ". . . It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *Manley v. Georgia,* 279 U.S. 1 (1929).

It would be unthinkable for the New York State Banking Board to promulgate a regulation that the discovery of an embezzlement from a bank creates a presumption that the crime was committed by the bank president. Yet, many states, including New York, tolerate an analogous rule that a finding that a race horse has been drugged raises a presumption that it was done or caused by the trainer. While there is a need for regulation of horse racing, it cannot be at the expense of arbitrariness and oppressive short cuts. State Legislation making the drugging of a horse a crime, would not be tolerated with such a presumption that the trainer was the guilty culprit. Judicial approval of such statute should not be given, merely because the consequences are not penal. Indeed, the deprivation of the accused's right to earn a livelihood is entitled to just as serious consideration.

The conflict in authority of the various State Courts concerning the tolerability of the statutory presumption makes the issue ripe for Supreme Court review. The pronouncements of the highest State Courts in Illinois, Florida and Maryland call for some effort at uniformity.

As set forth, the New York State statutory scheme is defective in respect to procedural due process. The agency

regulatory scheme is likewise defective, by raising a presumption to be drawn from the fact that a horse has been drugged, that it was done by the trainer or through his negligence. Rules 4120.5, 4120.6 and 4116.11.

Where there is "no rational connection between the facts proved and the ultimate fact presumed," it is Constitutionally defective. Thus, it was held that a statute permitting a presumption to be drawn that a firearm was shipped in interstate commerce from the mere possession of it was held constitutionally offensive. *Tot v. United States,* 319 U.S. 463, (1943). A statutory presumption may not be created to punish without evidence of guilt; *Seales v. United States,* 367 U.S. 203, (1961). It was held that a statutory presumption is invalid that a non-resident student at the time of his enrollment is presumed to remain a non-resident. *Vlandis v. Kline,* 412 U.S. 441 (1973).

To hold a trainer liable for the drugging of a race horse, based upon the mere fact that such event happened, is to overlook the irrationality of the conclusion. It is impossible for any person to stand guard over an animal 24 hours per day.

The regulatory presumption is repugnant and its application should be enjoined.

POINT FOUR

THE COURT BELOW WAS CORRECT IN DECLINING TO ABSTAIN FROM REACHING THE CONSTITUTIONAL ISSUES.

The constitutional issues presented by this appeal are clear. Is Due Process of Law violated by a statute that clearly does not *require* notice and opportunity for an administrative hearing to precede revocation or suspension of an *occupational* license? Is Due Process of Law violated by an administrative rule that creates a presumption of liability of a licensed trainer for negligence or intentional wrongdoing, where medication allegedly has been administered to the animal within forty-eight hours of the race, when others including racing officials themselves, employees of the track and even the general public have the same access to the horses as the trainer? The statute and the regulation are not complex and do not require State Court construction or interpretation. Therefore, there is no construction that a State Court can possibly make that would avoid the Federal issue. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964).

Prior to the pronouncement of the three judge Court in the case at bar, New York had committed itself to a proposition that licensees of the Board were to be treated in a discriminatory manner, thus becoming the only occupation licensed by the State subject to license revocation or suspension, without a prior hearing. In *Tappis v. New York State Racing & Wagering Board, Harness Racing Division,* 36 N.Y. 2d 863 (1975), the Court enunciated its position as follows:

> "The compelling and substantial state interest involved in maintaining discipline among trainers and owners . . . so

as to preclude the appearance or the fact of impropriety, justifies on-the-spot sanctions and penalties in advance of hearings and the procedure . . . followed involved no infringement of petitioner's constitutional rights and complied sufficiently with the requirements of the due process clauses of the Federal and State Constitutions."

The argument advanced by The New York Racing Association Inc. in its Brief amicus curiae that the Court was completely mistaken in its holding that Section 8022 expressly authorizes suspensions without prior or prompt post suspension hearings is incredible.

As set forth above, the New York Court of Appeals found in *Tappis* that Section 8022 and its attendant procedures involved no infringement of petitioner's constitutional rights. The Court below carefully considered the question of whether or not state law was open to question and found that it was not. (J.S. 10-11a). At the Appellate Division level, in *Tappis v. New York State Racing & Wagering Board,* 46 A.D.2d 613 (1st Dept. 1974), the Court therein specifically noted Section 8022's unconstitutionality and the later reversal by the Court of Appeals explicitly upholding its constitutionality left the interpretation of Section 8022 no longer the subject of debate. The highest Court had spoken on the question. To argue that *Tappis* did not even involve Section 8022 is to disregard the Appellate Division decision in regard to Section 8022, L.1940, ch 254, Section 47 as amended. (J.S. 10-11a).

What significance the purported interpretation by the Board had, that it could grant stays, which interpretation was proffered to the Court to discourage its jurisdiction, in view of the clear language of the statute and pronouncement by the State's highest Court is unclear. The experience with the Board has always indicated their outright refusal to grant stays and to insist on punishment first and hearings later, at a time when they were meaningless,

without regard to the risks of error, or irreparable injury to the aggrieved party. (36-40a).

Abstention is proper, only where an issue of *State Law* to be resolved by the State Courts might render it unnecessary to reach the Federal issue.

"In thus expanding federal judicial power, Congress imposed the duty upon all levels of the Federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because State Courts also have the solemn responsibility, equally with the federal courts . . . to guard, enforce and protect every right granted or secured by the Constitution. . . . Though never interpreted by a State Court, if a State statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit. . . . Abstention cannot be ordered simply to give State Courts the first opportunity to vindicate the federal claim. . . . For the recognition of the role of State Courts as the final expositors of State Law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *Zwickler v. Koota,* 389 U.S. 241, (1967).

Where there is no possibility of adequate state grounds for avoiding the resolution of the federal question, federal courts may not abdicate their role to interpret federal law, by leaving such interpretation to State Courts. Only where the interpretation of *State Law* might obviate the need to reach the federal question, is abstention suitable.

"Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, absten-

tion may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law and premature constitutional adjudication. . . . The doctrine, however, contemplates that deference to state court adjudication only be made where the issue of state law is uncertain. . . . If the state statute in question, although never interpreted by a state tribunal is not fairly subject to an interpretation which will render unncesssary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction." *Harman v. Forssenius,* 380 U.S. 528, at 534, (1965).

In the case at bar, there is no uncertainty as to State Law applicable. There is no doubt that plaintiff is a target of the statute and regulations under challenge. The only issue is whether the statute and regulations offend equal protection and due process. There is no need for a federal tribunal to defer to a State Court to make such determination. *Baggett v. Bullitt,* 377 U.S. 360, (1964), *Turner v. City of Memphis,* 369 U.S. 350, (1962); *McNeese v. Board of Education,* 373 U.S. 668, ; *NAACP v. Bennett,* 360 U.S. 471, (1959). Abstention does not mean abdication. It means deference to a state tribunal with expertise in state law where necessary. There is no need for deference to a state tribunal to interpret federal law, in that federal courts are endowed with primary jurisdiction for such tasks.

There is no way for the state to construe the statutes and regulations under fire to exclude plaintiff from their summary provisions and thus avoid the constitutional question.

In respect to the Trainer's Responsibility Rule, this appeal presents an issue whether the regulatory presumption is sufficiently rational to satisfy the requirements of due process of law.

Federal Courts have clear cut original jurisdiction to entertain actions brought to vindicate civil rights. *Monroe v. Pape,* 365 U.S. 658 (1961); *Baggett v. Bullitt,* 371 U.S. 360 (1964); *NAACP v. Bennett,* 360 U.S. 471 (1961).

Of course, Federal courts will not interfere with State regulatory schemes, especially where mathematical computations are challenged. It has been held that "if the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams,* 397 U.S. 471 (1970); *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). The case at bar does not ask this Court to adjudicate the propriety of a complex State mathematical system designed to achieve a required social welfare program.

Moreover, Federal courts will not seek to adjudicate the constitutionality of State enactments capable of a construction that will enable them to pass due process muster. "Abstention is appropriate where an unconstrued state statute is susceptible of a construction by the State Judiciary which might avoid in whole or in part the necessity for Federal Constitutional adjudication or at least materially change the nature of the problem." *Bellotti v. Baird,* 428 U.S. 132 (1977). Where a statute is clear on its face, the Federal issue cannot be avoided.

Nor are any of the other classic reasons for abstention present in the case at bar. There is no competing lawsuit between the parties pending in a State Court where Appellee would have opportunity to litigate the issues herein, that would imnpel a Federal Court to exercise discretion to abstain. *Carey v. Sugar,* 425 U.S. 73 (1976); *Judicie v. Vail,* 430 U.S. 327 (1977).

Probably the most compelling argument against abstention is the adoption by the New York State Courts of the reasoning of the three judge court in the *Matter of*

Gerard v. Barry, 59 A.D.2d 901 (2nd Dept. 1978), leave to appeal to the New York Court of Appeals denied and appeal dismissed, N.Y.L.J. June 15, 1978 at p.6 col.2 (June 13, 1978) where the Appellate Division, Second Department affirmed the order of Nassau County Supreme Court Justice Velsor enjoining the same appellants in the case at bar, from enforcing a summary suspension of a licensee, without a hearing. In the *Gerard* case, a licensee was suspended without a hearing for allegedly switching the credentials of two horses. As in the case at bar, it was not an "on-the-spot" suspension, but rather one meted out upon learning of the alleged horse switching. In disapproving of such summary procedure, Nassau County Supreme Court Justice Velsor wrote:

> "The precise question was presented to a constitutionally organized three-judge Federal Court in the most recent case of Barchi v. Sarafan et al (decided August 18, 1977) in the United States District Court for the Southern District of New York. That Court found Section 8022 of the Unconsolidated Laws of New York (applicable to harness racing) unconstitutional on two grounds; the first, by parallel reasoning applicable to the facts of this case, because a licensed trainer was disciplined without either a pre-suspension hearing, or prompt post-suspension hearing. I do not find any substantive distinction which would merit consideration in the perception that Barchi, supra, involved harness racing and the instant case pertains to 'flat' racing. Accordingly, it must be assumed as binding that absent any meaningful difference between revocation and suspension, and between harness racing and 'flat' racing, a disregard or deprivation of procedural due process in affording a licensed employee a hearing with the constitutional safeguards of the right to confront and cross-examine, is an unconstitutional invasion of a citizen's right to due process."

Thus, the New York Courts have elected to follow the ruling of this case by the three judge court, and a decision to abstain would not only work a hardship and injustice on Appellee, but would also work to toss the New York State Judicial response to *Barchi* into utter chaos and confusion.

In respect to the challenge to the New York State administrative agency regulatory system to the extent that it creates a presumption of misconduct by the trainer of a horse, that improper medication of the animal within forty-eight hours of a race resulted from his negligence or intentional wrongdoing, it is beyond civil that Federal Courts have concurrent original jurisdiction together with State Courts to review such type regulations, and an aggrieved party may properly make an election to select the Federal forum for review of the challenged administrative enactment. *California v. LaRue,* 409 U.S. 109 (1972); *Montayne v. Haymes,* 427 U.S. 236 (1976); *Meachum v. Fano,* 427 U.S. 3215 (1976).

CONCLUSION

THE JUDGMENT OF THE THREE JUDGE COURT SHOULD BE AFFIRMED AND SECTION 8022 OF THE NEW YORK STATE UNCONSOLIDATED LAWS AND RULES OF THE NEW YORK STATE RACING & WAGERING BOARD INVOKING THE TRAINER'S RESPONSIBILITY RULE SHOULD BE DECLARED UNCONSTITUTIONAL AND NULL AND VOID.

Respectfully submitted,

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Of Counsel

MOTION FILED
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In The

Supreme Court of the United States

October Term, 1977

No. 77-803

WILLIAM G. BARRY,
as Chairman of the New York State
Racing and Wagering Board, *et al.*,

Appellants,

— against —

JOHN BARCHI,

Appellee.

On Appeal from the United States District Court
for the Southern District of New York

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE HARNESS HORSEMEN INTERNATIONAL, INC.

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---

MOTION OF THE HARNESS HORSEMEN INTERNATIONAL, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 42(3) of the Rules of this Court, Harness Horsemen International, Inc., respectfully moves the Court for leave to file a brief *Amicus Curiae* in the above entitled case. Counsel for Appellants has not replied to movant's letter requesting consent, however, he has stated that he will not oppose this motion. The counsel for the Appellee has granted his consent.

Interest of Harness Horsemen International, Inc., *Amicus Curiae*

Harness Horsemen International, Inc., is a non-profit organization incorporated, duly organized and existing

under and by virtue of the laws of Washington, District of Columbia, in 1965.

The purpose for which Harness Horsemen International, Inc., is organized is to promote the sport of harness racing in the United States, Canada and other countries, and in so doing to do the following:

> (1) To cooperate with all authority charged with the government of harness racing in any locality, state, province, or country, whether such authority be governmental or private, and to render such authority all possible assistance in its duties; and to recommend to such authority changes in rules and regulations which, after due consideration by Harness Horsemen International, Inc., are in its opinion, in the best interests of the sport of harness racing;
>
> (2) To cooperate with and have as its members individuals, associations and corporations interested in the sport of harness racing; to disseminate information; to encourage the exchange of ideas and otherwise to suggest and promote improvement in the sport of harness racing; to advise its own members and other associations and individuals interested in the sport of harness racing with respect to problems arising in connection therewith, including but not limited to legal problems, legislation, taxes, regulations, rules and rulings, and interpretations thereof; and to act as a clearing house for the exchange of information among various associations, corporations and individuals interested in the sport of harness racing and to assist in all legal ways such persons, corporations and associations.

Members of Harness Horsemen International, Inc., consist of membership corporations or unincorporated

associations of harness horsemen, formed under the laws of any state, province or country who represent the horsemen racing at the pari-mutuel track or tracks recognized by the United States Trotting Association in the United States or the Canadian Trotting Association in Canada. At the present there exist Harness Horsemen Associations in 16 different States and 2 in Canadian Provinces with a total number of horsemen and other individuals dependent and representative of the harness horse industry in excess of one million persons.

As a non-profit corporation, Harness Horsemen International, Inc., through its various Associations, provides to the grooms, second grooms, trainers, second trainers, drivers and other licensees, adequate benefits by way of health and accident insurance, disability and life insurance and some associations at the present provide for a pension plan.

The question presented in the instant case is a matter of continuing importance to Harness Horsemen International, Inc. Briefly stated, the question is whether Section 8022 of the Unconsolidated Laws of the State of New York is unconstitutional for two distinct reasons, to-wit: (1) it allows or permits the state to irreparably sanction a harness race horse licensee (owner, driver, trainer, second trainer, groom, second groom, hot walker, exercise boy, blacksmith, veterinarian, concessionaire and Associations which conduct racing meets), without a pre-suspension or a prompt post-suspension hearing in violation of Appellee's right to due process; (2) it prohibits stays of execution of suspension orders pending review in cases of harness racing without a parallel prohibition in thoroughbred racing cases in violation of Appellee's right to equal protection.

The interest of Harness Horsemen International, Inc., is thus predicated on the substantial and far-reaching consequences that any decision here regarding meaningful due process and equal protection under the Fourteenth Amendment to the Constitution of the United States may have for all harness race licensees. Harness Horsemen International, Inc., is also concerned that this Court should be aware of the manifold ramifications of Section 8022 of the Unconsolidated laws of the State of New York and similar statutes in 12 other states which may affect the substantial rights for all harness race licensees wherever they may find themselves. See Page 5 of Jurisdictional Statement.

For these reasons, Harness Horsemen International, Inc., requests this opportunity to present its views on the instant case to this Court.

Conclusion

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *Amicus Curiae* brief in the present case in support of the position of the Appellee.

Respectfully submitted,

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In The

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Appellants,

— against —

JOHN BARCHI,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF *AMICUS CURIAE* OF THE HARNESS HORSEMEN INTERNATIONAL, INC.

INTEREST OF *AMICUS CURIAE*

The interest of *Amicus Curiae* is set out in the Motion for Leave to File, *supra.*

QUESTIONS PRESENTED

1. Does a state statute that allows or permits the state to summarily and irreparably sanction a harness horse race licensee without a pre-suspension or a prompt post-suspension hearing deny him his right to due process clause under the Fourteenth Amendment to the Constitution of the United States?

2. Does such a state statute that prohibits stays of execution of suspension orders pending review in cases of harness horse race licensees without a parallel prohibition in thoroughbred racing cases violate his rights and provisions of the equal protection clause under the Fourteenth Amendment to the Constitution of the United States?

STATUTE INVOLVED

We incorporate and adopt McKinney's New York Unconsolidated Laws, Section 8022, 1977-78 Supp., p. 177, as reproduced on pp. 3 and 4 of Appellants' Brief, and at footnote 1 of District Court's opinion, at page 4a of Jurisdictional Statement.

STATEMENT OF THE CASE

We incorporate and adopt the Statement of the Case as set forth in both the Motion to Affirm Judgment and the brief of the Appellee.

INTRODUCTION TO ARGUMENT

As *Amicus Curiae* we take a very definite and strong position in this case. To better understand our firm position, an explanation of the everyday events involving trainers, grooms, drivers and owners training their respective harness horses at the various race tracks is not only in order but a must.

Trainers and grooms, well in advance of the appointed or carded date of the race in which horses compete for substantial purses, prepare schedules for their respective horses.

These schedules list on a bulletin board or blackboard the names of the horses, the days of the week and workout plan for each horse during the current week.

Responsible trainers and grooms maintain these charts and schedules listing the schedule of jogging and training. Further, records are maintained with respect to not only the time a horse trained the entire mile, but also the timings at the first quarter pole, half mile pole, three quarter pole and the final quarter. Great weight is placed on the horse's ability and speed in training, especially on the second fractions after the half mile and more particularly the last quarter mile. All of the foregoing, together with other expertise on the part of the trainers and grooms, is with purpose. This is all done to prepare a horse for the actual race day the horse will race in a competitive race at a pari-mutuel race track for a substantial purse. In horse people parlance this is referred to as getting a horse "ready" for the race date.

Trainers do employ other subordinates such as grooms, second grooms, second trainers, hot walkers and exercise boys because in most instances they train any number of horses participating in a meet at a particular pari-mutuel race track for a particular time period.

The value of these horses is considerable and the purses for which they compete also is considerable.

It is the purses that horses earn which in a large degree contribute to the livelihood of the owner, trainer and all subordinate licensees.

Therefore, any suspension of a licensee, of necessity interferes with the orderly training schedule heretofore described. A disruption of training and racing schedule does affect not only the horse but ultimately, in the event

the horse is not "ready", the trainer, driver, owner and all subordinate licensees are also deprived of earnings and thus their livelihood is affected. Suspension of licenses, even if for short intervals, does cause serious and severe impact on trainers, drivers and owners.

Suspensions, incidentally, have been and are imposed on trainers, owners, drivers, grooms and other licensees by the various Racing Boards in the various states conducting harness horse racing meets at pari-mutuel race tracks for a variety of reasons. The following is a list of some of the rules and regulations for which suspensions are imposed: failure to maintain financial responsibility; association with undesirables; driving with indifference or lack of effort; driving with design not to win, or in a manner inconsistent with an attempt to win; a trainer's responsibility for the condition, fitness, equipment and soundness of each horse at the time it is declared to race and thereafter when it starts in a race; and the trainer's responsibility at all times for the condition of all horses trained by him.

The foregoing serve as a sampling of a few of the rules and regulations which could lead to a licensee's suspension that govern in many states where pari-mutuel racing is permitted.

It is, therefore, of utmost importance that the laws in the 12 various states heretofore referred to governing suspensions of licenses provide a meaningful constitutional pre-suspension or prompt post-suspension hearing within the framework of the Due Process Clause.

We offer the foregoing introductory observations of the everyday goings on in the harness horse racing industry in an effort and as an aid to better understand the

arguments in support of the Appellee, and our position as *Amicus Curiae*.

SUMMARY OF ARGUMENT

I

A state statute such as Section 8022 of the Unconsolidated Laws of the State of New York should permit and allow a harness horse race licensee a pre-suspension or a prompt post-suspension hearing. The summary suspension of the license of a harness horse race licensee by the State as in the case before this Court pending hearing and determination of disciplinary charges denies such harness horse race licensee due process of law and thereby deprives him of his substantial right to earn a livelihood.

II

A state statute that prohibits stays of execution of suspension orders pending review in cases of a harness horse race licensee without a parallel prohibition in thoroughbred racing is violative of his rights under equal protection of the law. In this case, the Three-Judge District Court for Southern District of New York as reported *sub nom. Barchi v. Sarafan,* at 436 F.Supp. 775 (1977), and reproduced in the appendix to the Jurisdictional Statement beginning page J.S. 3a., held and was justified in holding that Section 8022, *supra,* was unconstitutional because it permits the State to summarily and irreparably sanction a harness horse race licensee without a pre-suspension or a prompt post-suspension hearing violative of his rights to due process. The same Court held, and was justified in holding, that the prohibition of stays of execution of suspension orders pending review of cases of a harness horse race licensee with-

out a parallel prohibition in thoroughbred racing is violative of his right to equal protection of the law.

ARGUMENT

I. THE NEW YORK STATUTE DENYING A HARNESS HORSE RACE LICENSEE A PRE-SUSPENSION OR A PROMPT POST-SUSPENSION HEARING IS VIOLATIVE OF DUE PROCESS OF LAW.

The summary suspension of the license of the Appellee John Barchi, in this case, pending hearing and determination of disciplinary charges, denies him due process of law in that it summarily and irreparably deprives him of his right to earn a livelihood.

A certain degree of legality and precision of procedure must be observed when an administrative body such as in this case the New York State Racing and Wagering Board performs a judicial or quasi-judicial function. This, indeed, is very necessary in order that evidence of the contending parties may be fairly and fully presented and, further, that the particular administrative body may be adequately advised with regard to the claims of the respective parties. Certain procedural formalities are so embedded in our system of administration of justice that we regard them as guaranteed by the due process of law provisions of our constitutions.

The paramount test of the presence or absence of due process of law in any administrative procedure is the presence or absence of the basic rudiments of fair play long established in our law.

Two essential ingredients to due process are notice and hearing. Concerning due process, this Court held that: "[it] is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471 at 481 (1972). This Court demonstrated its unique concern for those destitute and poverty stricken individuals whose very existence depends on public assistance. The depriving of a protected interest which involved the termination of welfare benefits mandated a hearing. See, *Goldberg v. Kelley,* 397 U.S. 254 (1970). Again it is made abundantly clear that due process applies in the summary suspension of a driver's license for failure to post security sufficient to satisfy an unadjudicated tort claim. In *Bell v. Burson,* 402 U.S. 535 at 539 (1971), this Court stated:

> "Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without procedural due process required by the Fourteenth Amendment."

Whether an evidentiary hearing was required before the termination of disability benefits under the Social Security Act presented an issue in the case of *Mathews v. Elridge,* 424 U.S. 319, 333 (1976), namely, "the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter." The factors which were considered in the evaluation of the procedure satisfying due process of law was also enunciated in *Mathews v. Eldridge, supra,* as follows:

> "Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, our prior decisioins indicate that identifi-

cation of the specific dictates of due process generally require consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

The private interest is plainly and simply, the licensee's right to a livelihood. We have in this case a summary punishment with irreparable injury to the trainer. Once his license is suspended, every racing day lost by the said trainer cannot be replaced, regained or recaptured. The disruption of the training schedule of the horses; the loss of some or all of his owners; the loss of employees; and all other losses which contribute to the loss of income and livelihood to the trainer, once lost, as a result of such a suspension as in this case, can never be made whole again.

The owners that employ the licensee trainer under suspension are also unjustly punished and penalized. So long as their horses remain stabled with the suspended licensee and so long as they employ said suspended licensee trainer, these innocent owners are forbidden and prohibited from competing and carding their horses at parimutuel race tracks in what in most cases amounts to substantial purses. The innocent owner thus finds himself between two equally hazardous alternatives of, "Scylla and Charybdis" of the classic days or, "Catch 22" of modern times. In the event the innocent owner terminates the employment of the suspended trainer licensee and transfers his horses to another new trainer, the disrupting of the horses' schedule together with the time necessary for the new trainer to adapt to the new horses, all contribute to and cause further delay in getting the horses "ready," thereby causing irreparable and substantial loss to the innocent owner. On the part of the suspended licensee trainer, in most cases, once an owner leaves him the possibility of return is very minimal and in most instances permanent. The same holds for employees, once an exodus of horses occurs, an exodus of employees of necessity follows, which usually remains permanent. New relationships usually strengthen and grow into permanent ones. Good name, general reputation and status also serve as contributing factors to the loss of income and livelihood which cause irreparable and substantial damage to the suspended trainer licensee. Once this occurs any future vindications or reversal of suspension in the ultimate hearing is not sufficient to wipe out the stigma or cure the irreparable damage and injury caused said suspended trainer. His losses are not only gone and lost forever, during the suspension, but in some instances a trainer may be wiped out of business completely and permanently without the choice of two equally hazardous alternatives.

It is repelling and shocking to the conscience, for an Agency, Board or Commission to show such disrespect for an individual's rights, while under the guise of the public interest, such a body would rationalize its summary and definitive power so clandestinely as to indelibly cast its mark and ruin the character and reputation of innocent individuals together with guilty individuals. The opinion of the Three-Judge District Court for the Southern District of New York, *sub nom. Barchi v. Sarafan, supra,* stated:

> "There is an inherent revulsion against a system which, as has occurred in this case, favors quick sanctions, even in the face of a demonstration of inno-

cence, at the expense of an accurate determination of responsibility. In the present case, the plaintiff submitted himself to two polygraph examinations, one at the Board's behest. Both examinations indicated plaintiff's innocence in the drugging of 'Be Alert'. There would appear to be little more that the plaintiff could have done to demonstrate a lack of culpability. Nevertheless, the presiding Steward ordered a suspension. No great urgency was apparent here. A hearing prior to administering of sanctions, or a stay pending review, would have given the Commission the opportunity to review the Steward's action. The opportunity to be heard in review of a state sanction must be available in a meaningful manner and at a meaningful time. *Armstrong v. Manzo,* 308 U.S. 545, 552 (1965). On balance, the Court concludes that the absence of either a pre-suspension hearing or a prompt post-suspension hearing denies plaintiff the meaningful review due process requires. *Bell v. Burson, supra; Armstrong v. Manzo, supra.*"

Although we agree that the interest of the state and public should be considered, we do not conclude that the interest of the state and public should overshadow the private interest of the trainer licensee, as in this case, to the extent that the denial of a stay renders any future reviewing process a meaningless function and a futile exercise in constitutional due process. The loss in the majority, if not all, harness horse racing suspension cases is not only substantial but also irreparable as we have already indicated.

The risk of an erroneous deprivation in the absence of a prior hearing is great in this case. Barchi, the licensee trainer, did accept the burden of coming forward with proof. He offered his own uncontradicted testimony and the results of two polygraph examinations, one of which was conducted by the Board. Incidentally, in this regard,

it is no secret among horsepeople that Racing Boards in some states have consistently followed the policy of offering polygraph examinations to accused horsemen, disregarding the results if they support the horseman, but relying heavily on them as grounds for finding a violation in the event of failure to pass said test on the part of the horseman. In the case before this Court, there is other evidence in the record and, in fact, Appellants make no claim that there is any evidence of Barchi's guilt. Appellants are reduced, therefore, to a defense of the naked proposition that, merely because he is a trainer, he is guilty and punishable for the illegal medication of the horse "Be Alert," even if he had nothing to do with it or, in fact, knew absolutely nothing about it. It would take strong justification indeed to support such an inherently obnoxious doctrine, and none appears.

It is absurd and illogical to conclude and hold a trainer liable for the drugging of a race horse solely upon the fact that such an event occurred. No person or trainer could possibly watch all of the horses in his or her care or stable for a continuous 24-hour period each and every day. In spite of the tight security at all tracks, a large number of other trainers, grooms, owners, race track personnel, tack, and equipment personnel also have access to the barn and stall area. It would not be too difficult for a discharged second trainer, groom, second groom, hot walker, exercise boy, disgruntled member of the general public, or anyone other than the actual trainer to drug a horse by either injection or orally giving the horse medication through the mouth or placing a drug in the feed. There have been reported cases in the past and there probably will continue to be reported cases in the future of dissatisfied and disgruntled former employees of a

trainer or disgruntled members of the general public who without the knowledge or consent of the trainer have in the past, or will in the future, administer a drug to a horse. Cases of this type have occurred in spite of the tightest of security at all race tracks.

Bluntly but accurately put, what Appellants propose is to hold the trainer as a hostage; if certain disapproved events occur, regardless of their authors, the trainer is to be offered up as a sacrifice. If ever there was a concept universally condemned by every civilized society, this is it. Not only cannot it be justified, but the arguments offered by the New York State Racing and Wagering Board in its support are even more appalling.

The Board makes much of the fact that they must exercise this power of suspension immediately and forthwith because of the state and public interest involved. It is difficult to reconcile this position of exigency and urgency in this case in the light of the 16 days that elapsed before the Board imposed its suspension. The Board's inaction and failure to act with prompt dispatch until the lapse of 16 days further demonstrates its lack of logic and inconsistency.

The Appellants in this case have argued that swift, even Draconian, enforcement is a necessary and indispensable weapon in the regulation of the harness horse racing industry. They have contended swift action is necessary and hence they have argued against the due process challenge.

To this we counter that there are about 38 states that permit pari-mutuel racing. Not all of those states are similar in their procedure as in this case. In spite of the fact that a licensee is offered a meaningful hearing before

suspension in those states, horse racing has not suffered any nor have the race tracks in those states been forced to shut down their operations. Racing has flourished in those states without any major scandals or corruption, contrary to what the Appellants would have us believe.

It is difficult to understand, rationalize and constitutionally reconcile the lack of a parallel in any other field of endeavor. It appears that only the field of harness horse racing has been and is singled out for swift Draconian treatment.

Lawyers, while under indictment, are permitted to practice law; doctors, osteopaths, chiropractors, psychologists, real estate brokers, and countless of others do not face the same Draconian treatment in the face of a alleged violation of a rule, regulation or law, as we find in this case where Barchi has been singled out. We find no other parallel as this in any other profession.

It would well behoove the New York State Racing and Wagering Board along with the other Racing Boards that have singled out the harness horse racing industry for Draconian treatment to heed the words of the great Irish statesman and orator, Edmund Burke: "I do not know the method of drawing an indictment against a whole people."

This Court by giving heed to the words of Burke, the orator and statesman, can through its pronouncement, put an end to the Draconian treatment accorded the horse racing industry and restore horsemen and especially harness horsemen to the status of first class citizens.

We are told that this rule, denying a pre-suspension or a prompt post-suspension hearing, is necessary to preserve the "appearance" of honesty, to deter fraud or to prevent

loss of public confidence. Apart from the concern for the cosmetic effect of their action, rather than a judgment based upon evidence, we may ask with whose appearance the Board is concerned, *mostly its own*. A positive test occurs, the trainer is suspended, the public gets the impression of an alert, on-the-ball Board which has conducted a competent investigation exposing the facts and the wrongdoer. Presto, the Board is now off the hook. Actually, this is a deterent to thorough investigation, first, because as in the old Gilbert and Sullivan refrain, "a victim has been found," and second, because a thorough continuing investigation which turned up the actual culprit, would be an embarrassment to the Appellants, who would then find themselves in the position of having punished an innocent man.

We are also told that this procedure is necessary and helpful to efficient enforcement. This can be disposed of out of hand. There is not a police agency in the world which could not (frequently does) claim that it could operate much more efficiently and successfully, free of the constitutional restrictions imposed upon it by our Constitution, Courts and Legislatures. But we have long since emphatically decided that this is an unacceptable price for "efficient" police work.

The Appellants in their brief place great emphasis and weight on the case of *Dixon v. Love,* 431 U.S. 105 (1977). This Court did approve of the summary suspension of a driver's license because of statutory designated number of traffic offenses and convictions. *Dixon v. Love, supra,* is not analogous nor is it germane to the issues of this case before the Court. In the *Dixon* case the petitioner was accorded and afforded a hearing on each and every offense prior to his conviction and prior to the loss of his driver's

license. A denial of a further hearing would in no way abridge Petitioner's right to due process. Since the State Legislature did provide for a limited license allowing the Petitioner an occupational license to drive in the course of his employment, necessary to his livelihood, this Court rightfully permitted the summary suspension of the license. In the case before this Court we do not have a similar provision for an occupational license, nor do we have any type of pre-suspension or prompt post-suspension hearing. Therefore, *Dixon v. Love, supra,* does not apply.

II. THE NEW YORK STATUTE THAT PROHIBITS STAYS OF EXECUTION ORDERS PENDING REVIEW IN CASES OF A HARNESS HORSE LICENSEE WITHOUT A PARALLEL PROHIBITION IN THOROUGHBRED RACING IS VIOLATIVE OF EQUAL PROTECTION OF THE LAW.

The Three-Judge District Court for the Southern District of New York *sub nom. Barchi v. Sarafan,* 436 F.Supp. 775, *supra,* ruled that Section 8022, *supra,* violated the due process of law clause in that Section 7915 of the Unconsolidated Laws of New York do not prohibit stays of execution of suspension where charges are preferred against thoroughbred race-horse licensees, while stays are prohibited for harness racing licensees.

Both harness and thoroughbred racing in the State of New York come within the jurisdiction of the New York State Racing and Wagering Board. The Appellants in this case, the Board, were afforded an opportunity to justify a distinction between the two classes of licensees. They did not come forward with any proof or any rational basis to justify their distinctions between the two

classes of licensees. It is incumbent on the State to "show" an "underlying" . . . interest to which its discrimination . . . can be rationally related". *Shapiro v. Thompson,* 394 U.S. 618 (1969).

See also, *Carey v. Population Service International,* — U.S. —, 52 L. Ed. 2d 692 (1977), where this Court stated:

> "It is enough that we again confirm the principle that when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant State policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy."

Chief Justice Vinson in the case of *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948), stated:

> "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

And it was Justice Douglas who said in *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 485 (1955),

> "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Since the Appellants have failed to demonstrate any rational basis for the discriminatory classifications, and the difference in treatment afforded harness and thoroughbred licensees, there is no question but that there exists in this case an indiscriminate imposition of inequalities. Therefore, we respectfully submit that the prohibition of stays pending review in harness racing is a denial to the Appellee of equal protection of law.

We submit that the District Court below, in declaring that Section 8022, *supra,* is unconstitutional in that it is

violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, did so in a constitutionally correct, proper and sound manner.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

Dated: Milwaukee, Wisconsin, July 12, 1978.

Respectfully submitted,

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MOTION FILED
MAY 22 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, *et al.*,

Appellants,

—against—

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NEW YORK RACING ASSOCIATION INC.

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IN THE

Supreme Court of the United States

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No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, *et al.*,

Appellants,

—against—

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE NEW YORK RACING ASSOCIATION INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The New York Racing Association Inc. hereby respectfully moves, pursuant to Rule 42(3) of the Rules of the Supreme Court, for leave to file as *amicus curiae* the accompanying brief in support of the position of appellants in the above-captioned proceeding. Counsel for appellants have consented to the filing of this brief. Counsel for appellees have not consented.

Interests of Amicus

The New York Racing Association Inc. ("NYRA") is a non-profit racing association incorporated pursuant to Section 7902 of the Unconsolidated Laws of the State of

New York (McKinney 1961 & Supp. 1977-78), and owns and operates Aqueduct, Belmont Park and Saratoga thoroughbred racetracks. Since 1973, both the thoroughbred and harness racing tracks in New York State have been under the supervision of The New York State Racing and Wagering Board ("the Board") which superseded two former bodies, the State Racing Commission and State Harness Racing Commission, as the state body supervising horse racing.

NYRA moves to submit this brief because it believes that the decision on appeal holding unconstitutional the statutory procedure affording hearings to suspended harness racing licensees was wrongly decided and, if permitted to stand, will impair the ability of the Board to enforce its rules and regulations and supervise the conduct of its licensees not only at harness racetracks, but at thoroughbred racetracks as well. Unless the opinion below is reversed, there is a significant possibility that the same or similar claims will be asserted against the licensing statute applicable to throughbred racing (New York Unconsolidated Laws § 7915 (McKinney 1961 & Supp. 1977-78)).

NYRA further believes that the court below failed to give sufficient weight to the importance to the vitality of racing of avoiding not merely the fact of impropriety but the appearance of impropriety in its conduct. The court below failed to recognize the decisive importance of the horse drugging rules sought to be enforced in this case to the maintenance of the high degree of public confidence necessary in order for all forms of horse racing to survive, to continue to provide employment for thousands of persons, and to safeguard an important source of public revenue.

NYRA, as a private racetrack proprietor, believes that its views with respect to the imposition of disciplinary

suspensions upon participants in racing for infractions of the rules may be of special assistance to the Court in its consideration of the issues involved in this appeal. Accordingly, NYRA respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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Supreme Court of the United States

IN THE

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, *et al.*,

Appellants,

—against—

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE NEW YORK RACING ASSOCIATION INC.

Questions Presented

1. Whether the District Court erred in finding New York Unconsolidated Laws § 8022 (McKinney Supp. 1977-78) unconstitutional as denying due process and equal protection of the laws.

2. Whether the District Court should have abstained from determining the constitutionality of New York Unconsolidated Laws § 8022 pending a construction of that statute by the New York State courts.

Statement of the Case

To avoid repetition, we adopt the Statement of the Case set forth in the brief of the Appellants. We do emphasize, however, that appellee Barchi did not, as provided in § 8022 of the New York Unconsolidated Laws, demand a hearing before the Board. Rather, he immediately commenced this action. Although the District Court enjoined absolutely the enforcement of § 8022 (J.S. 1a-2a*), it nevertheless devoted a substantial portion of its opinion to the particular facts of Barchi's case.

ARGUMENT

The three-judge District Court held that § 8022 was unconstitutional in failing to provide either a pre-suspension hearing *or*, alternatively, a prompt post-suspension hearing or a discretionary stay. The District Court reached a wrong result—and reached it by imposing two unjustified interpretations on the statute under scrutiny:

> —The District Court was unjustified in holding that § 8022 prohibits stays of suspensions. Since, as Judge Griesa makes clear in his concurring opinion (J.S. 22a), the court would have upheld the constitutionality of the statute if it had not prohibited discretionary stays, the decision should be reversed on this point alone.

* References here and throughout in the form "J.S. —a" are to the Appendix to the Appellants' Jurisdictional Statement. References in the form "—a" are to the Appendix.

> —The District Court was unjustified in holding that a prompt post-suspension hearing is not available under § 8022 if one were to be demanded.

I.

Section 8022 Does Not Prohibit Stays and Thus Denies Neither Due Process nor Equal Protection of the Laws.

Although we believe that § 8022 comports fully with applicable constitutional requirements even if read to prohibit stays of license suspensions, we believe that the District Court was completely mistaken in holding that the only possible interpretation of § 8022 is that it expressly prohibits stays.

The District Court's conclusion is based solely on language in the second sentence of § 8022 which provides that pending the hearing and determination (which a licensee may request pursuant to the first sentence of § 8022), "the action of the [Board] in refusing to grant or in revoking or suspending a license shall remain in full force and effect." However, when considered in the context of the total statutory scheme governing harness license suspensions, this language is more reasonably construed as meaning that when a hearing is requested the suspension remains in full force and effect *unless the Board orders otherwise,* especially in light of the District Court's recognition that the Board has an inherent power to stay its own orders* and the Board's interpretation of § 8022 as not prohibiting it from staying suspensions. (34a) Further,

* The Court so recognized by holding that the Board could issue stays of suspensions under the thoroughbred licensing statute (§ 7915 of the New York Unconsolidated Laws (McKinney 1961 & Supp. 1977-78)), not because that statute expressly permits stays, but because it does not prohibit them. (J.S. 17a)

the District Court failed to read § 8022, which relates to the conduct of hearings, together with another statute, § 8010(2) of the Unconsolidated Laws (McKinney 1961), which empowers the Board to suspend licenses.* Consistent with the Board's own interpretation of its powers, nothing in § 8010(2), as is also the case with the correlative thoroughbred statute (§ 7915 of the Unconsolidated Laws (McKinney 1961 & Supp. 1977-78)), prohibits the Board from staying a suspension issued pursuant to the suspension authority granted therein.

Since, as Judge Griesa pointed out in his concurring opinion, the District Court would not have found § 8022 to deny due process or equal protection had it not read the statute to expressly prohibit stays, the decision of the District Court should be reversed in its entirety.

At the very least, this is a classic case for abstention. The District Court, rather than imposing its own interpretation on the statute and rejecting out of hand the interpretation of the Board, should have permitted the New York courts to speak authoritatively to the subject.** *Carey* v. *Sugar*, 425 U.S. 73 (1976); *Bellotti* v. *Baird*, 428 U.S. 132 (1977).

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* § 8010(2) is set out in Appendix A hereto, page 1a.

** Contrary to the view of the District Court (J.S. 10a), the decision in *Tappis* v. *New York State Racing and Wagering Board*, 36 N.Y.2d 862, 331 N.E.2d 697, 370 N.Y.S.2d 922 (1975) did not deal with the question of whether § 8022 prohibits stays or, if so, whether such a prohibition was constitutional. *Tappis* did not even involve § 8022, but involved a different statute and rule, and was a fine, not a suspension case. In fact, the broad discretionary licensing powers of the Board and its predecessor commissions have been confirmed by the New York courts. *See, e.g., Sullivan County Harness Racing Ass'n* v. *Glasser*, 30 N.Y.2d 269, 278-79, 283 N.E.2d 603, 608, 332 N.Y.S.2d 622, 628 (1972).

II.

Section 8022 of the New York Unconsolidated Laws Does Not Deny a Prompt Post-Suspension Hearing.

The District Court failed to give adequate consideration to the nature of the activity which the state regulatory scheme at issue in this case was designed to safeguard. As other courts have recognized, racing is a unique and highly sensitive endeavor, in which there is inherent a significant potential for abuse. Thousands of horses and hundreds of state licensees participate in both harness and thoroughbred racing in New York, millions of dollars are wagered and paid out in pari-mutuel operations on and off the racetracks, and racing is a significant source of state revenue.

The ability of the authorities charged with the responsibility for supervising racing promptly to impose penalties for conduct which threatens the operation and integrity of racing is of vital importance, particularly in the highly sensitive area of drugging. Thus, the power to suspend a licensee, pending a full hearing, is an essential weapon in the state's arsenal to enforce its rules, to deter their infraction, and thereby to maintain the highest degree of safety for horses and riders and also the highest degree of public confidence in a sport in which the mere appearance of impropriety threatens to undermine that confidence.

The District Court cited but ignored the decision of the United States Court of Appeals for the Fourth Circuit in *Hubel* v. *West Virginia Racing Commission*, 513 F.2d 240 (4th Cir. 1975), in which the court, although faced with a nearly identical situation, reached a quite different result. *Hubel* upheld against a due process challenge the 47-day summary suspension, without any availability of a stay, of a licensed trainer prior to a formal hearing under a drugging rule similar to the rule here. Unlike the *Barchi* court,

the *Hubel* court gave proper consideration to the nature of the activity, the purpose of the rule being enforced, and the serious interests of the state and the public which were at stake in the area of illegal drugging of horses. The *Hubel* court stated, with respect to the drugging rule, that:

> "The state has at least two substantial interests to be served. It has a humanitarian interest in protecting the health of the horse, and it has a broader and more weighty interest in protecting the purity of the sport, both from the standpoint of protecting its own substantial revenues derived from taxes on legalized pari-mutuel betting and protecting patrons of the sport from being defrauded. Collectively, these interests, we think, justify the severe penalty of disqualifying a horse that has been drugged, its trainer and perhaps its owner, from further participation in legalized racing until the matter can be heard and determined and an appropriate final sanction formulated. The combination of strict liability, imposed by Rule 793, and immediate suspension without the possibility of stay, deters tampering and promotes care. The combination also removes from racing those who have proved either unable or unwilling to protect their horses from unauthorized drugs." *Hubel, supra,* 513 F.2d at 243.

Judge Winter, writing for the court, went on to explain why the court believed the mandatory denial of stays of suspensions to be justified in the context of illegal drugging:

> "Should the offense of 'doping' a horse be committed, whether by intentional act of his handlers or negligence in protecting him from the depredations of outsiders, the offense is so serious and the consequences so severe that absolute protection to the horse and to the public is fully warranted until the matter can be formally resolved. The public is entitled to protection from the continuing danger that one who participates in drugging his horse will do so again, and that one who fails to protect his horse from drugging by others will repeat his negligence. We hold that these considerations justify the mandatory denial of a stay of any suspension for violation of the rules pending the notice and hearing that the due process clause requires." *Hubel, supra,* 513 F.2d at 244.

Although the District Court speculated that Barchi might suffer loss of income for 15 days,* it failed to recognize that the very existence of drugging creates a non-remedial situation for the public. In nearly all cases, as in this case, the results of drug tests are not available until long after the race has been run and the pari-mutuel pool paid out.

No such considerations were even discussed by the *Barchi* court. Instead, the District Court seemed to focus on the period of 16 days that elapsed in the instant case between discovery of the drugging and Barchi's suspension. Just why this fact assumed so much importance in the view of the court is unclear, since Barchi suffered no loss of privileges or livelihood during such period. Moreover, the court found the statute unconstitutional on its face, not as applied to Barchi. The mere delay by an enforcing agency in imposing a sanction in a single case does not support the court's holding that the statute is unconstitutional on its face. In fact, such a delay strongly suggests that the enforcing agency is acting with that deliberate care which characterizes due process.

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* The non-party trainer's affidavit (39a-40a) referred to by the District Court (J.S. 7a) offers no basis for holding out the spectre of a blighted career as flowing from a 15 day suspension. In our experience, trainers who are otherwise qualified do not permanently lose horses previously under their care following a suspension of such brief duration.

The confusion of the District Court's opinion is further highlighted by its holding that § 8022 failed to provide for either a pre-suspension or a prompt post-suspension hearing, despite the fact that the polygraph tests, one of which was "administered . . . at the behest of the [Board]" (J.S. 6a-7a), and discussions of the incident between Barchi and a representative of the Board prior to his suspension afforded Barchi the "opportunity for informal consultation with designated personnel empowered to correct a mistaken determination [that] constitutes a 'due process hearing' in appropriate circumstances." *Memphis Light, Gas and Water Division* v. *Craft*, 46 U.S. L.W. 4398, 4402 n.17 (U.S. May 1, 1978), citing *Goss* v. *Lopez*, 419 U.S. 565, 581-84 (1975) and Friendly, *Some Kind of Hearing*, 123 U.Pa. L.Rev. 1267 (1975). The court itself recognized the significance of the pre-suspension contacts between Barchi and the Board representative, but saw them only as tending to demonstrate his "innocence". (J.S. 16a)* The unique result below is that Barchi, who was himself afforded precisely that form of pre-suspension confrontation indicated by prior decisions of this Court, and who failed to request a hearing, succeeded in obtaining an injunction against the statute on the ground that it afforded him neither a pre-suspension hearing nor a prompt post-suspension hearing.

The District Court apparently recognized that summary suspensions would not violate due process if the statute per-

* Even if Barchi's innocence in the drugging was at all relevant to the determination of the constitutionality of the statute, the court ignored the fact that Barchi was *also* suspended under Rule 4120.6 of the Board, which imposes upon him the duty to "guard . . . each horse trained by him in such manner and for such period of time prior to racing the horse so as to prevent any person not employed by or connected with the owner or trainer from administering any drug . . . or other substance resulting in a positive test." (J.S. 5a) Barchi's polygraph tests in no way absolved him from failure to properly protect his horses.

mitted a "*prompt* post-suspension hearing." (J.S. 16a) (emphasis in original). In finding the statute unconstitutional, however, the District Court erroneously concluded that the statute failed to provide for a prompt post-penalty hearing and that its operation with respect to this plaintiff would necessarily have deprived him of such a hearing.

In the first place, there is nothing in the language of the statute which would prevent the Board from affording a suspended licensee a hearing with the utmost expedition, consistent with the nature and extent of the sanction and the readiness of the licensee to proceed. On the contrary, the statute requires that the Board, upon request for a hearing by the affected person, "shall give prompt notice of a time and place for such hearing." To be sure, the statute imposes an outer limit of thirty days for the Board to make a final written decision. But the statute does not prevent a decision from being rendered within a shorter time period where necessary and appropriate to afford a licensee the meaningful hearing with which the District Court was properly concerned.* Indeed, Counsel to the Board advised the District Court that "where no stay is given, a prompt hearing is always offered" (Affidavit of John M. Dailey, Appendix p. 34a).**

In reaching its decision, however, the District Court ignored the fundamental jurisprudential tenet that statutes are to be construed in a manner consistent with constitu-

* Similarly, the provision in § 8022 permitting continuances of hearing "from time to time for the convenience of any of the parties" cannot be read to preclude a prompt hearing. Such provision protects the licensee who may need a continuance to seek out evidence or witnesses or otherwise prepare his case.

** The trainer-plaintiff in one of the two companion cases which were held in abeyance pending the decision in *Barchi* (*see* opinion of the District Court at J.S. 6a), "was offered a hearing within 48 hours and refused it". (34a)

tionality whenever possible. *United States* v. *Vuitch*, 402 U.S. 62, 70 (1971); *Driscoll* v. *Edison Light & Power Co.*, 307 U.S. 104, 115 (1939). Certainly no basis can be found in the present record for concluding that Barchi has been or would have been denied the right to a prompt post-penalty hearing. He never requested a hearing of any kind. His only response to the order of suspension was the institution of the instant action two days later. By his own failure to act, Barchi declined to set into motion the mechanism for the "prompt post-penalty hearing" which was available to him under § 8022, and which the Board indicated it was prepared to give him. The short of it is that § 8022 on its face does not deprive any sanctioned licensee of due process, nor is there any basis for finding the statute unconstitutional as applied to Mr. Barchi who never even invoked it.

CONCLUSION

The judgment of the District Court should be reversed on the merits, or, in the alternative, the judgment should be vacated and the District Court directed to abstain from a decision pending construction of § 8022 of the New York Unconsolidated Laws by the New York State courts.

Dated: New York, New York
May 22, 1978

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APPENDIX

APPENDIX A

§ 8010. Licenses for participants and employees at harness race meetings

• • •

2. If the state harness racing commission shall find that the experience, character and general fitness of the applicant are such that the participation of such person in harness horse race meets will be consistent with the public interest, convenience and necessity and with the best interests of racing generally in conformity with the purposes of this act, it may thereupon grant a license.

Without limiting the generality of the foregoing, the commission may refuse to issue a license, pursuant to this section, if it shall find that the applicant (a) has been convicted of a crime involving moral turpitude; (b) has engaged in bookmaking or other form of illegal gambling; (c) has been found guilty of any fraud or misrepresentation in connection with racing, breeding; (d) has been found guilty of any violation or attempt to violate any law, rule or regulation of racing in any jurisdiction for which suspension from racing might be imposed in such jurisdiction; (e) or who has violated any rule, regulation or order of the commission. The commission may suspend or revoke a license issued pursuant to this section if it shall determine that (a) the applicant or licensee (1) has been convicted of a crime involving moral turpitude; (2) has engaged in bookmaking or other form of illegal gambling; (3) has been found guilty of any fraud in connection with racing or breeding; (4) has been guilty of any violation or attempt to violate any law, rule or regulation of any racing jurisdiction for which suspension from racing might be imposed in such jurisdiction; (5) or who has

Appendix A

violated any rule, regulation or order of the commission, or (b) that the experience, character or general fitness of any applicant or licensee is such the participation of such person in harness racing or related activities would be inconsistent with the public interest, convenience or necessity or with the best interests of racing generally.

• • •

MOTION FILED
JUN 22 1978

IN THE

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OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, *et al.*,

Appellants,

—against—

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* OF JOCKEYS' GUILD, INC.

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IN THE

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No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, *et al.*,

Appellants,

—against—

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF JOCKEYS' GUILD, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Jockeys' Guild, Inc. hereby respectfully moves, pursuant to Rule 42(3) of the Rules of the Supreme Court, for leave to file the accompanying brief, as *amicus curiae,* in support of the decision below of the Three-Judge District Court for the Southern District of New York, which is reported *sub nom. Barchi* v. *Sarafan* at 436 F. Supp. 775, and in support of the position of the Appellee. Counsel for the Appellee has consented to the filing of this brief. Counsel for the Appellants has not consented, but has stated that he will not oppose this motion.

Interest of *Amicus Curiae*

The racing industry is divided into two parts, thoroughbred racing and harness racing. In New York, the State Racing and Wagering Board, the members of which are the principal Appellants in this case, supervises both.

In the thoroughbred racing industry, the horse owners generally engage free-lance jockeys, through the jockeys' agents, to ride in each particular race. These jockeys are licensed by the Racing Board of the state where the race is to be conducted.[1]

Jockeys' Guild, Inc. (the "Guild") is a New York not-for-profit corporation providing for the welfare of jockeys in the thoroughbred racing industry. It furnishes (i) representation and, through appropriate insurance carriers, life insurance, health insurance and disability benefits for active jockeys and (ii) direct financial aid for permanently disabled jockeys. The Guild has approximately 1,553 active members. These constitute the vast majority of the active jockeys in the United States.

The Guild respectfully moves to submit this brief because it believes that the decision below holding Section 8022 of the New York Unconsolidated Laws (McKinney 1961 & Supp. 1977-78) unconstitutional was correct. It believes that Section 8022, in providing for the summary punishment of an occupational licensee pending a hearing, is patently inconsistent with the protective standards required by this Court in order to satisfy the requirements of due process in administrative proceedings.

[1] These jockeys are regarded as independent contractors for virtually all purposes, including federal tax purposes. In approximately 5 states, however, a jockey is treated as the employee of the owner of the particular horse he rides for Workmen's Compensation purposes. New York is one of these few states.

The Appellants would ask this Court to weigh the interests of the State of New York on the one hand and all of its licensees in the harness racing industry on the other hand and to determine conclusively, as a matter of substantive law, that the interests of the State always emerge as paramount. They ask this Court to carve out an exception for the harness racing industry which would sanction pre-hearing discipline, regardless of the nature of the charges.

The fact that the Appellants are responsible for regulating the thoroughbred racing industry in addition to the harness racing industry and their heavy reliance on cases in the former industry, convinces the Guild that they seek to establish a precedent in the case at bar which would be applicable, not only to licensees in the harness racing industry, but also to licensees in the thoroughbred racing industry (which would include jockeys). Unlike the parties to the case, who are only concerned with the application of Section 8022 in the State of New York, the Guild and its members would be affected by such a precedent nationally.

The Guild has reason to believe that, when the parties argue the question of whether or not the summary disciplinary procedure in Section 8022 is constitutional, they will do so only in the context of the facts of the case at bar, which involved the type of situation in which the public might have been defrauded or lost confidence. The Guild wishes to apprise the Court of the fact that disciplinary charges may be levied against a licensee for violating any one of a number of "Rules of Racing" and that some of these situations do not involve possible fraud, loss of

public confidence, or even the mere appearance of impropriety. In particular, the Guild is concerned with those situations in which the licensee believes in good faith that it is unsafe to ride.[2]

The Guild further believes that, because the types of situations which may arise in the racing industry vary so widely, room must be left to weigh the private interests of the licensees against the public interests which are affected in the same situations and, where appropriate, to tailor procedural protections to fit them. Section 8022 leaves no such room and thus fails to satisfy the requirements of due process.

---

[2] In addition to the Guild's primary interest in the welfare of jockeys generally, the Guild has a direct and substantial financial interest in track safety. It provides, each year, about $73,000 in direct financial aid to approximately 25 paraplegics and about $229,000 in direct financial aid to members injured at tracks. In addition, Illinois Hospital & Health Services, Inc., the health insurance carrier for the Guild members, has advised the Guild that it paid out $63,507 during the last policy year in claims by jockeys who incurred medical expenses as a result of on-track injuries in excess of the reimbursable limits under the policy of accident insurance which most racing associations in the country carry, as a group, with Lloyds of London. The Guild has urged these racing associations, through Thoroughbred Racing Association of North America, Inc., their trade association, to increase these limits. However, recent quotations by Lloyds have indicated that, if every racing association were required to carry an amount of insurance which the Guild considers adequate, several would probably have to close their race courses or go bankrupt, to the further detriment of the Guild's members. These figures are not surprising when it is understood that the expenses of a single on-track injury can easily exceed $100,000 over the years.

Accordingly, the Guild respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, *et al.*,

Appellants,

—against—

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR JOCKEYS' GUILD, INC. AS *AMICUS CURIAE*

Jockeys' Guild, Inc., as *amicus curiae,* respectfully submits this brief on the merits, pursuant to Rule 42 of this Court, in support of the decision below of the Three-Judge District Court for the Southern District of New York, which is reported *sub nom. Barchi* v. *Sarafan,* at 436 F. Supp. 775, and in support of the position of the Appellee.

Question Presented

The Appellants presented the following question to this Court in their Jurisdictional Statement:

> "1. Does a statute providing for summary suspension of the occupational license of a racing industry participant, pending hearing and determination of disciplinary changes [*sic*], deny licensees due process or equal protection of the laws?"

In their Brief, however, they narrowed the question to read as follows:

> "Does a statute providing for summary suspension of the occupational license of a *harness* racing industry participant prior to any hearing and determination of disciplinary charges deny such licensee due process or equal protection of the laws?" [Emphasis added]

Notwithstanding this narrower question, the Guild is convinced that the Appellants seek to have this Court establish a precedent in this case which would be applicable to *all* participants in the *entire* racing industry. This conclusion is supported by the failure of the Appellants to distinguish between harness racing and thoroughbred racing in the subsequent pages of their Brief, by their heavy reliance on cases involving the thoroughbred racing industry, by the fact that the Appellants are as much concerned with regulating the thoroughbred racing industry as the harness racing industry in the State of New York, and by the brief

amicus curiae of The New York Racing Association Inc., which only operates thoroughbred race courses.[1]

Interest of *Amicus Curiae*

As the Guild has stated in its motion for leave to submit this brief, it wishes to adequately apprise the Court of the fact that disciplinary charges may be levied against a licensee for violating any one of a number of the "Rules of Racing" and that some of these situations do not involve possible fraud, loss of public confidence or the mere appearance of impropriety. In particular, the Guild is concerned with those situations in which the licensee believes, rightly or wrongly, that it is unsafe to ride and is punished for not riding in a summary disciplinary proceeding.

In the thoroughbred racing industry, for example, there are at least four situations beyond the control of a jockey which pose a threat to his safety—an unsafe race course (e.g., a frozen track), hazardous weather conditions (e.g., lightning, blinding sleet), an unsound horse and the physical illness of the jockey himself.[2] We submit that, in any

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[1] The New York Racing Association Inc. has been held to be in symbiotic financial relationship with the State of New York. *Halpern* v. *Lomenzo*, 81 Misc.2d 467, 473, 367 N.Y.S.2d 653, 660 (Sup. Ct., N.Y. Co. 1975).

[2] This underlying issue of track safety is what prompted the Guild to encourage three of its members to address this Court before. In a Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia (at p. 4), they asked this Court to determine whether West Virginia had deprived them of their rights under the Fourteenth Amendment of the United States Constitution by permitting them to be excluded from a race track in West Virginia without any hearing or specified reason. They asserted that they had in fact been banned from the track because "they had objected to racing on frozen and unsafe tracks and had resisted attempts to turn Guild members into 'company' men—

one of these situations, a jockey may be justified in refusing to fulfill his riding engagement.[3] Yet, in virtually every state where thoroughbred racing is conducted, the Rules of Racing provide that a jockey may be punished for failing to do so.[4] On its face, the rule authorizes such punishment without regard to the jockey's reason.[5] The punishment may include suspension.[6]

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that is, to bring them so completely under the control of track management that they could not exercise independent judgment and honestly fulfill their obligations to their employers and the public." *Wilkerson et al.* v. *Waterford Park, Inc. et al.* [N.O.R.], (W. Va., May 26, 1969), *cert. denied,* 396 U.S. 906 (1969).

[3] The Guild respectfully submits that a jockey, merely by accepting a riding engagement, does not assume unusual risks. A track accident may result in his permanent injury, paralysis or even death, and we submit that he should not be compelled, by threat of punishment, to expose himself to these unusual dangers.

[4] These rules are substantially the same in all of the states where thoroughbred racing is conducted. In New York, Rule 40.6 provides: "If a jockey engaged for a race or for a specified time refuses to fulfill his engagement, he may be punished as provided by sections 22.12 through 22.15, *supra.*" 19 NYCRR §40.6.

[5] The Guild recently prevailed upon the Kentucky State Racing Commission to amend the rule in that State to provide as follows: "No rider shall be forced to ride a horse he believes to be unsound, nor over a racing strip he believes to be unsafe, but if the stewards find a rider's refusal to fulfill a riding engagement is based on a personal belief unwarranted by the facts and circumstances, such rider may be subject to disciplinary action." 810 KAR 1:009, §9.

[6] In New York, Rule 22.12 grants the race stewards the right to suspend trainers, jockeys and others licensed by the State Racing Commission from "acting or riding" for as much as 60 days. 19 NYCRR §22.12. In *Halpern* v. *Lomenzo,* 81 Misc. 467, 367 N.Y.S. 2d 653 (Sup. Ct., N.Y. Co. 1975), this latter rule was adjudged an unconstitutional delegation of the licensing authority. We understand from counsel for the trainer in that case that the New York Attorney General has withdrawn his appeal from the decision and that the power to suspend is no longer being exercised by the stewards appointed by The Jockey Club and the racing association, but that the state appointed steward, acting alone, is continuing to exercise the power.

Summary of Argument

The District Court weighed the private interest of the Appellee against the broad interest of the State of New York and correctly concluded, on the basis of the facts in this case, that Section 8022 of the New York Unconsolidated Laws, which provides for summary suspension of a licensee pending a hearing, did not provide him with the meaningful review which due process requires, and was accordingly unconstitutional. We respectfully submit that, even if the scale had tipped on the side of the Appellants in the circumstances of this case, Section 8022 would still fail to satisfy the requirements of due process because of the overly broad sweep of its application.

Morrissey v. *Brewer,* 408 U.S. 471 (1972), calls for such procedural protections as the *particular situation demands.* This Court should reaffirm that doctrine by holding that a statute which provides for summary suspension of an occupational license pending a hearing and determination of disciplinary charges in any one of a variety of situations, denies the licensee due process. The Court has, we respectfully submit, already made it clear in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), that the *particular* interest of the licensee which will be affected by the official action in a given type of situation must be weighed against those *particular* governmental interests which may be affected in the same type of situation. That test should be applied in this case.

ARGUMENT

I.

Section 8022, in providing a summary disciplinary procedure, precludes balancing the correct private and public interests in specific situations and accordingly fails to satisfy due process.

The relevant part of Section 8022 provides as follows:

> "If the state harness racing commission shall . . . revoke or suspend such a license granted by it, . . . the . . . licensee . . . may demand, within ten days after notice of the said act of the commission, a hearing before the commission . . . . Pending such hearing and final determination thereon, the action of the commission . . . in revoking or suspending a license . . . shall remain in full force and effect." McKinney 1961 & Supp. 1977-78.

Thus, Section 8022 provides for summary disciplinary action against a licensee while a hearing is pending. No authority is given the Commission (or the State Racing and Wagering Board now acting in its stead) to stay the revocation or suspension of a license before a hearing.

a. *The appropriate test for evaluating whether the safeguards of a procedure meet the requirements of due process in any given situation mandates that the* specific *and* particular *private interest of the licensee which will be affected by the official action must be weighed against those governmental interests which can reasonably be expected to be affected in that same situation.*

The District Court below found, and the Appellants do not challenge, that both the nature of a trainer's license in New York as well as New York's *ratio decidendi* in suspending it entitle the Appellee to due process protection.

With regard to the type of protection to which such a licensee is entitled, this Court has held that:

> "[D]ue process is flexible and calls for such procedural protections as the *particular situation demands.*" [Emphasis added.] *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972).

In the face of this requirement, the Appellants would ask this Court to uphold the constitutionality of a State statute which provides for *summary* punishment pending a hearing and, apparently, to permit the extension of such summary treatment to the many types of situations in which a licensee might be found to have breached a Rule of Racing. They would ask this Court to weigh the respective interests of the State of New York on the one hand, and all of its licensees as a group on the other hand, and to determine conclusively, as a matter of substantive law, that the interests of the State in the racing industry are always paramount. Henceforth, as we understand it, there would be no "weighing of interests" in the racing industry.

In support of this position, the Appellants cite the decisions of two United States Courts of Appeals to the effect that:

> "the state interest in regulating the racing industry outweighs the licensee's interest in obtaining a hearing prior to imposition of disciplinary action . . ." Appellant's Brief at 14.

The first case (in the order decided) is that of *Hubel* v. *West Virginia Racing Comm.*, 513 F. 2d 240 (4th Cir. 1975), a case in which the license of an owner and trainer of thoroughbred horses was suspended pending a hearing and determination. The second is *Ruane* v. *N.Y. State Racing & Wagering Board*, 460 F. Supp. 819 (1975), *affirmed per curiam*, 532 F. 2d 860 (2d Cir. 1976), a case involving the summary imposition of fines on eight jockeys who refused to ride on a turf course (as opposed to the dirt track) because they believed the turf course would be dangerous as a result of rainfall.[7]

Since these cases were argued, this Court has had occasion to re-examine, in a case involving whether an evidentiary hearing were required before the termination of disability benefits under the Social Security Act, which factors must be considered in evaluating whether an administrative procedure satisfies the dictates of due process. In *Mathews* v. *Eldridge*, it said:

> "Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the *governmental and private interests that are affected.* More

[7] The Guild was a party to the *Ruane* case, and The New York Racing Association Inc. entered an appearance in it.

> precisely, our prior decisions indicate that identification of the specific dictates of due process generally require consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 334-35 (emphasis added) (citations omitted).

The test enunciated in *Mathews* v. *Eldridge* has since been followed in *Ingraham* v. *Wright*, 430 U.S. 651, 682 (1977); *Mathews* v. *Williams*, 424 U.S. 951 (1976), *vacating Williams* v. *Weinberger*, 494 F.2d 1191 (5th Cir. 1974); *Mathews* v. *Mattern*, 425 U.S. 987 (1976), *vacating* 519 F.2d 150, 168-69 (3d Cir. 1975); *McGrath* v. *Weinberger*, 541 F.2d 249 (10th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977); *Lee* v. *Thornton*, 538 F.2d 27, 33 (2d Cir. 1976); *Kennedy* v. *Robb*, 547 F.2d 408, 414-15 (8th Cir. 1976), *cert. denied*, 431 U.S. 959 (1977); *Zurak* v. *Ryan*, 550 F.2d 86, 93 (2d Cir. 1977), *cert. denied*, 433 U.S. 914 (1978); *Basel* v. *Knebel*, 551 F.2d 395, 398 (D.C. Cir. 1977); *Ong* v. *Tovey*, 552 F.2d 305, 307 (9th Cir. 1977); *Drummon* v. *Fulton County Dept. of Family & Children's Services*, 563 F.2d 1200, 1210 (5th Cir. 1977); and *Montrym* v. *Panora*, 438 F. Supp. 1157 (D. Mass. 1977), distinguishing *Dixon* v. *Love*, 431 U.S. 105 (1977), which the Appellants stress.

As in the case of any true balancing test, its application produced varying results in the foregoing decisions; a

hearing was required in some of the cases and not in others. The important factor is that all of these cases, in reaching a decision as to the necessity of a hearing, employed the *Mathews* v. *Eldridge* test in order to fairly weigh the respective interests of the parties.

b. *The private interests which may be affected by official action in the racing industry include a wide variety of interests, such as that of the licensee's physical safety.*

Mathews v. *Eldridge* requires, first, identification of ". . . the private interest that *will be affected* by the official action." 424 U.S. at 335 (emphasis added). The official action involved in that case was the termination of the individual's disability benefits, as a result of an initial determination that he was no longer disabled. The "potential injury" from an erroneous deprivation, it was noted, did not extend to loss of the benefits themselves, as these would be paid retroactively. Therefore, the only "private interest" *affected* by the official action was "the uninterrupted receipt of this source of income." 424 U.S. at 340 (1976). The Court did not regard the "degree" or the "possible length" of this poential deprivation sufficient to be controlling. *Id.* at 341.

In the case presently before this Court, the official action was the suspension of a trainer's license as a result of an initial determination that his horse had received improper medication. This official action was designed (i) to punish alleged wrongdoing and (ii) to discourage others from wrongdoing. The "potential injury" from erroneously depriving him of his license was "a loss of clients and an irretrievable loss of income." 436 F. Supp. at 781. Thus the "private interest" *affected* by the official action was his "right to a livelihood". *Id.* The Court found that

the "degree" of the potential deprivation was "irreparable and substantial" and that its length was that of "any race meeting in progress." *Id.*

In each of these cases, care was taken to identify not only the official action, but the "potential injury" which the licensee would suffer from an erroneous deprivation of his benefits or license, as well as its degree and duration. This permitted identification of the specific private interest that had to be weighed against the government's interest.

These cases are to be contrasted with the *Hubel* and *Ruane* cases, *supra,* upon which the Appellants rely, but which preceded *Mathews* v. *Eldridge.* In the *Hubel* case, the official action consisted of the suspension of an owner-trainer's license as a result of an initial determination that his horse had been drugged. However, the court neither identified the "potential injury" to the licensee from an erroneous deprivation of his license, nor explored the degree or duration of that injury. The closest it came to identifying any interest of the licensee was his "normal and usual right to notice and hearing before disciplinary sanctions are applied . . ." 513 F.2d at 243 (1975). We submit that this is not an interest "affected" by an "erroneous deprivation" of his license and that the Court was simply using a one-sided scale.

In the *Ruane* case, the official action consisted of the levying of fines against eight jockeys as a result of initial determinations that the track was safe and that they had improperly refused to fulfill their riding engagements. They had refused to ride on the turf course, as opposed to the dirt course, because they "believed the turf track would be dangerous as a result of rainfall." 400 F. Supp. at 820.

The District Court said, in footnotes, that there was no coercion to ride, and seemed to regard the interest of the licensee to be balanced against the State's interest as, simply, "the risk of discipline". 400 F. Supp. at 821, nn. 3 and 4. It seems clear, however, that the "potential injury" resulting from an erroneous determination ran far beyond the mere accrual of interest on the fines, which could have been remitted. The official action in the *Ruane* case lay in two parts. The first part was the initial determination that the track was safe; the second was the determination, two days later when the fines were imposed, that they had improperly failed to fulfill their riding engagements. 400 F. Supp. at 820. At the time of the first, each jockey was given the opportunity to ride on the turf course or to risk punishment. His "potential injury" under the first alternative was his physical safety (as well as the heavy financial cost to him of any physical injury). The effect of the official action was either to persuade him to ignore that interest or to punish him for seeking to protect it, rightly or wrongly. We submit that it is the interest in his physical safety which, under *Mathews* v. *Eldridge,* must be weighed against the public interest.

c. *The public interests of preventing fraud, insuring public confidence and maintaining tax revenues are not always affected in these situations.*

Mathews v. *Eldridge* also requires *"analysis* of the governmental . . . interests that are *affected."* 424 U.S. at 334 (emphasis added). We respectfully submit that there is no room under this requirement for broad statements of public interest designed to justify Draconian justice.

In identifying which public interests were *affected* (of the various ones which might be involved) in *Mathews*

v. *Eldridge,* this Court looked directly at the "potential injury" which the public would suffer if that portion of the official action which was under constitutional challenge were different. In that case, it was the injury to the public which would result if every recipient of disability benefits were entitled, as a matter of constitutional right, to an evidentiary hearing prior to their termination. It thereupon identified the specific public interest which was *affected* as that of "conserving scarce fiscal and administrative resources". 424 U.S. at 348.

In the case presently before this Court, the District Court considered the injury to the public which would have resulted from conducting a prompt hearing. It found that there would have been little interference with track supervision. 436 F. Supp. at 781. It therefore concluded, in effect, that although tax revenues, preventing fraud and insuring public confidence were all legitimate interests of the State of New York, they were not interests *affected* by that portion of the official action which was under constitutional attack.

Once again, the *Hubel* and *Ruane* cases are clearly distinguishable, having been argued before *Mathews* v. *Eldridge.* In the *Hubel* case, the Court of Appeals for the Fourth Circuit identified the State's interests as those of protecting the "health of the horse" and "the purity of the sport", and discussed these interests at length. 513 F.2d at 243. However, there was no discussion of how these interests would have been *affected* if punishment had been postponed until after a hearing or if there had been a prompt hearing.

In the *Ruane* case, the District Court quoted the New York Court of Appeals to the effect that there was a "com-

pelling and substantial State interest in maintaining discipline among trainers and owners." *Tappis* v. *New York State Racing and Wagering Board,* 36 N.Y.2d 862, 864, 331 N.E.2d 697, 698, 370 N.Y.S.2d 922, 923 (1975). The District Court then concluded that "a similar interest applies to the question of discipline among jockeys." 400 F. Supp. at 822. It is difficult to see how transferring the race from the turf track to the dirt track, or the refusal of the jockeys to ride if the race were not transferred, could have resulted in possible fraud or loss of public confidence; the race program expressly contemplated such a transfer. There was apparently some dispute as to how promptly the jockeys voiced their concern to the stewards. 400 F. Supp. at 820. The State Racing and Wagering Board found that the "belated refusal . . . to ride . . . was calculated to cause turmoil and chaos".[8] 400 F. Supp. at 822. However, there was no finding that such turmoil and chaos did in fact result from the substitution of riders, nor substantial evidence that switching the race course would have in fact caused turmoil and chaos. We respectfully submit that the principal reason for disciplining the jockeys was, as the District Court found, to maintain "discipline among jockeys". We submit that this is far too vague a public interest to satisfy the test of *Mathews* v. *Eldridge.*

It is true that the mere threat of suspension deters both trainer and jockey from conduct which deviates from what the Rules of Racing require of him. The State has a substantial interest in this deterrent effect when it can be expected to deter fraud or prevent loss of public confi-

[8] There are always situations in which changes have to be made after betting on a race has begun. Examples are where a horse breaks out of the starting gate prematurely, exhausts itself and must be scratched, or where a jockey is unseated on the way to the post, injured and replaced.

dence. It would be an unusual situation, however, where the deterrent effect of the official action affected these public interests, but where the official action against the licensee himself did not. The public interest cannot be said to outweigh the private interest on the basis of this deterrent effect alone.

Furthermore, the State has conflicting interests in certain situations, such as when matters of safety are involved. On the one hand, it has a substantial interest in having the race run. On the other hand, we submit that it has the responsibility of minimizing the risk of physical injury or even death to the human participants. We submit that, under *Mathews* v. *Eldridge,* this interest must be weighed as well, even though it may have a "negative" effect on the governmental side of the scale.

The consequences of an erroneous determination do not necessarily stop with the licensee who, for example, refuses to fulfill his racing engagement. If the stewards seek out substitute riders and convince them to ride, as they did in the *Ruane* case, the consequences of an accident will fall upon these substitute riders. The evil of this situation is that the substitute riders may be less experienced, or financially more hard pressed, and thus more easily convinced that they should accept the risk.

We would be remiss not to point out that the predominant interest of the State of New York, and of other States, in racing is in the substantial revenue which the State derives as a "take-out" from the pari-mutuel handle.[9]

[9] We understand that the State of New York would have lost in excess of $100,000 in revenue if the race in the *Ruane* case had been cancelled. Transcript of Testimony in hearing on appeal by New York State Racing and Wagering Board, Dec. 17, 1974, p. 147.

The Appellants do not squarely face this underlying financial interest of the State. Its very magnitude in each race is not only the measure of the State's true interest, but also a measure of the pressure which the constitutional guarantee of due process must resist. Clearly, the State's financial interest cannot, of itself, outweigh the licensee's fundamental right to due process.

II.

Section 8022, in providing a summary disciplinary procedure, preempts analysis of the risks of an erroneous determination and, when appropriate, development of substitute procedural safeguards, and accordingly offends due process.

The danger of Section 8022, and of similar procedural statutes which might be enacted throughout the country to regulate the thoroughbred racing industry if the decision below were reversed, is the breadth of its sweep. Section 8022 does not distinguish between situations in which the risk of an erroneous deprivation is great from those where the risk is small. It discourages the development of substitute procedural safeguards where they are clearly needed. It conceals administrative reluctance to grant stays which imply an admission that the initial determinations might have been wrong. It discourages prompt hearings, which can be inconvenient to the members of the Board.[10]

[10] The Guild also maintains that the New York Administrative Procedure Act (McKinney Consol. L. 1977) applies to these proceedings. Section 401(1) of that Act merely provides that the adjudicatory procedures of the Act shall be followed in the *granting* of certain licenses and does not limit the applicability of those procedures in situations where a license has already been granted. Consequently, we maintain that Section 301 of the Act requires a hearing before the suspension of an occupational license in the racing industry. *Accord, In re Gerard* v. *Barry*, 59 App. Div. 2d 901, —— N.Y.S.2d —— (2d Dep't, 1977), *appeal dismissed*, N.Y.L.J. June 15, 1978 at 6, col. 2 (June 13, 1978). The exception in Section 401(3) which permits a summary suspension because the "public health, safety or welfare" requires emergency action clearly does not apply where the licensee's safety is involved.

a. The case before this Court is an example of the high risk of a possible erroneous determination.

In evaluating whether an administrative procedure satisfies the requirements of due process, *Mathews* v. *Eldridge* requires more than identification of the particular private interest which would be affected by an erroneous determination—that is, the "consequences" of error. It also requires an evaluation of the "risk" of an erroneous deprivation as a result of its use—that is, the "probability" of error. 424 U.S. at 335.

Mathews v. *Eldridge* involved a situation where the potential value of an evidentiary hearing, in addition to the medical reports, was limited. 424 U.S. at 344. Thus, the risk of an erroneous initial determination, and hence of an erroneous deprivation, was small.

At the other extreme is the case presently before this Court; the District Court concluded there was little more that the Appellee could have done to demonstrate a lack of culpability. 436 F. Supp. at 782. Therefore, the "probability" of error in the initial determination of culpability was considerable.

b. Substitute procedural safeguards are clearly necessary in some situations.

In the *Ruane* case, the risk of an erroneous determination, and hence deprivation, was compounded by the fact that it was necessary to determine initially whether or not the track was safe; this had to be done, not merely before

a formal hearing could be held, but in a matter of moments before the race was run. In situations such as this, the eventual hearing is not always meaningful because the existing pre-hearing procedures do not adequately provide for assembling and preserving objective evidence of the conditions which were the basis of the licensee's action.[11]

This is not the proper place to discuss the risk of an erroneous determination under the present procedures in the racing industry, or the probable value of additional or substitute procedures, in every possible situation in which disciplinary action may be taken against a licensee. The Guild would simply point out that there are situations, such as those where safety is involved, where the private interest of the licensee weighs heavily in his favor and where, no matter how quickly the initial determination must be made, an objection by the licensee is always timely. These situations call for special procedures. As this Court has said in *Mathews* v. *Eldridge*:

> "All that is necessary is that the procedures be tailored, . . . to 'the capacities and circumstances of those who are to be heard' . . . to insure that they are given a meaningful opportunity to present their case." 424 U.S. at 349, quoting *Goldberg* v. *Kelly*, 397 U.S. 254, 268-69 (1970) (footnote omitted).

We respectfully submit that the summary punishment authorized by Section 8022 pending a hearing discourages

[11] The motion for preliminary injunction in the *Ruane* case requested the District Court to prohibit "the stewards from disciplining jockeys who refuse to ride on grounds of hazardous conditions until the [New York Racing and Wagering] Board promulgates administrative procedures to protect the jockeys." 400 F. Supp. at 821.

the development of "meaningful" review and thus inhibits due process.

c. Stays have not in fact been granted, except possibly in very rare instances, and hearings have not in fact been held promptly.

We have noted the arguments of The New York Racing Association Inc. in its Brief *amicus curiae* (i) that the Board has interpreted Section 8022 as permitting it to grant stays and (ii) that prompt hearings are always offered. pp. 3 & 9. We are not in a position to admit or deny those statements, insofar as they pertain to the harness racing industry. However, we would certainly take issue with any inference to the effect that, in the thoroughbred racing industry in New York, stays are granted frequently or hearings are held promptly.[12] We respectfully submit that the constitutionality of Section 8022 should not be allowed to turn on such vague representations of procedural good faith by the State of New York as those advanced by The New York Racing Association Inc. as *amicus curiae*, particularly when the Appellants themselves do not advance these arguments in this Court and in fact present their question to this Court in a form which deeply concerns the Guild about their true intentions.

[12] In the *Ruane* case, a hearing by the Board was requested on November 5, 1974, after informal negotiations for the remission of the fines had failed. The hearing was commenced on December 17, 1974 and continued on January 7, 1975. On February 20, 1975, four days before winter racing in New York was to begin without a decision by the Board, the proceeding in the federal District Court was commenced. The Board and District Court handed down their decisions on March 17 and August 28, 1975, respectively.

The Guild respectfully submits that the constraints which procedural due process impose on governmental decisions do not leave room for broad exceptions, such as one which would cover all of the situations which might arise in an entire industry. This Court should continue to require that the administrative procedures in any given area of governmental activity meet the very sensible standards of *Mathews* v. *Eldridge*.

The Guild believes that Section 8022 of the Unconsolidated Laws of the State of New York, by providing for the summary suspension of occupational licenses in the harness racing industry pending a hearing and determination of the charges, patently fails to qualify under that test. Accordingly, it believes that the District Court below properly applied the law and reached the correct result in holding Section 8022 unconstitutional.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

Dated: New York, New York
June 19, 1978

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-803

WILLIAM G. BARRY, et al. - - - Appellants

versus

JOHN BARCHI - - - - - - - Appellee

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

— and —

BRIEF *AMICUS CURIAE* OF THE HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-803

WILLIAM G. BARRY, et al. - - - - *Appellants*

v.

JOHN BARCHI - - - - - - - *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42(3) of the Rules of the Supreme Court of the United States, the Horsemen's Benevolent and Protective Association respectfully moves for leave to file as *amicus curiae* the accompanying brief in support of the position of appellee in this proceeding.

Counsel for appellee have consented to the filing of the brief. Counsel for appellants have not consented.

The Horsemen's Benevolent and Protective Association ("HBPA") is a nonprofit organization representing more than fifty thousand trainers and owners of thoroughbred horses in the United States, Puerto Rico and Canada. It is fair to say that virtually all thoroughbred trainers and owners are HBPA members. The HBPA, in addition to the management of certain benevolent and protective activities on behalf of its members, frequently represents the general interests of thoroughbred trainers and owners before boards of track stewards, racing commissions and legislative bodies.

Because the HBPA represents the overwhelming majority of thoroughbred trainers subject to summary discipline at the hands of track officials, the HBPA believes it can contribute significantly to the Court's consideration of the issues in this proceeding, in much the same way that an international union may be able to visualize and stress the importance of a particular labor law question to the national labor movement better than the local union and a small company that are parties to the controversy. *Cf.* R. Stern & E. Gressman, *Supreme Court Practice* 320 n. 87 (4th ed. 1969). Moreover, the HBPA believes that the accompanying brief *amicus curiae* addresses (1) the question of the functional appropriateness of a pre-suspension hearing; and (2) the question of the proper scope of the entitlement doctrine, more directly than the briefs of

the parties. The HBPA therefore requests leave to file the accompanying brief *amicus curiae.*

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION

STATEMENT OF THE CASE

The question in this case is one of timing. Section 8022 of the New York Unconsolidated Laws permits the New York State Racing and Wagering Board ("NYSRWB") to suspend summarily the license of a trainer of harness horses. The trainer may subsequently contest the suspension at a hearing where he

can claim a number of procedural protections, including the right to be represented by counsel, the right to present evidence, and the right to a written decision based on the record. During the conduct of the hearing, the suspension remains in full force and effect. The question is simply whether the hearing already guaranteed by law must be held before the suspension takes effect, or whether the NYSRWB can continue to impose suspensions without affording trainers any opportunity prior to the suspension to respond to the charges against them.

In harness racing, horses are tested for improper medication both before and after the race. In thoroughbred racing, horses are tested for improper medication only after the race. The test may even be performed and the results made available several days after a race. The pari-mutuel payoffs to track patrons are unaffected in either event. If a pre-race test discloses improper medication, the horse is scratched. If a post-race test discloses improper medication, only the owners' purse is affected; track patrons have long since cashed their winners and shredded their losing tickets.

ARGUMENT

I. The Due Process Clause Requires That a Trainer Be Afforded a Hearing Prior to Imposition of a Disciplinary Suspension.

A. *The Nature of this Controversy.* The question before this Court is not whether an informal or abbreviated administrative hearing may, in some cases, satisfy the requirements of the due process clause. Of course it might. *E.g., Goss* v. *Lopez,* 419 U. S. 565, 584 (1975). Rather, the question is whether the due process clause requires that a trainer be afforded a meaningful opportunity (1) to contest charges that a horse under his care has received improper medication; and (2) to explain his role in the matter, before the imposition of disciplinary suspension by track officials.

We emphasize that neither section 8022 nor the administrative regulations promulgated thereunder limit the power of track officials to impose pre-hearing suspensions. The New York Court of Appeals has confirmed that section 8022 authorizes "on-the-spot sanctions and penalties in advance of hearings," *Tappis* v. *New York State Racing and Wagering Board,* 36 N. Y. 2d 862, 863, 331 N. E. 2d 697, 698 (1975). The three-judge court found specifically that appellee Barchi "was not given access to the [drug] analysis [or] the specimen, and was never confronted with the circumstances under which it was taken." J.S. at 6a.[1]

[1]The Jurisdictional Statement will be cited as "J.S."

The contention that Barchi was granted an "informal conference-type 'opportunity to be heard,' " Brief for Appellants at 14 (citation omitted), and the suggestion that bureaucratic delay of track officials be transmuted into action "with that deliberate care which characterizes due process," Brief *Amicus Curiae* of NYRA at 7, must therefore be regarded as disingenous at best.

B. *Other License Cases and the Requirement of Pre-Suspension Hearings.* The case that most closely parallels this controversy is *Bell* v. *Burson,* 402 U. S. 535 (1971). There, a Georgia statute provided that an uninsured motorist's driver's license should be suspended unless following an accident he posted security to cover damages claimed by the other parties. The statute "excluded consideration of the motorist's fault or liability . . . from the administrative hearing conducted prior to the suspension." 402 U. S. at 535-536.

The *Bell* Court first held that due process required the administrative hearing to include a "determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee," 402 U. S. at 540. The Court then rejected Georgia's "argument that it [need not] afford the licensee an inquiry into the question of liability . . . prior to the suspension of the license." 402 U. S. at 542. Instead, the Court held:

> "While 'many controversies have raged about . . . the Due Process Clause,' it is fundamental

> that except in emergency situations (and this is not one) due process requires that when a state seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." (402 U. S. at 542) (emphasis in original)

The rule of *Bell* v. *Burson*—that some kind of hearing must ordinarily precede the deprivation of a protected property interest—remains unchanged by the Court's recent decision in another license case, *Dixon* v. *Love*, 431 U. S. 105 (1977). In *Dixon*, the Court held that the due process clause did not prohibit the summary revocation of the driver's license of an operator whose license had three times been properly suspended. 431 U. S. at 115. Appellants attempt to impress *Dixon* into the service of the proposition that "a statute which authorizes the summary suspension of a license to engage in an occupation or other activity which is subject to strict public regulation, but with an opportunity for a prompt [post-suspension] hearing before the licensing authority, has long been recognized as conforming to the requirements of due process," Brief for Appellants at 11-12.

Dixon v. *Love* cannot be freighted with that doctrinal burden. Mr. Justice Blackmun's opinion for the Court took pains to point out that revocation of the driver's license, under the applicable statute and regulations, was mandatory after three fully-adjudicated suspensions. 431 U. S. at 109 (quoting regulation), 111

n. 8 (interpreting regulation), 113 (barring possibility of "clerical error" in reporting suspensions, "revocation decisions are largely automatic"). The concurring opinions leave no doubt that the revocation of a driver's license was, in *Dixon*, understood by the Court to be an automatic substantive penalty imposed after the third fully-adjudicated suspension, and not a new proceeding designed to determine additional facts necessary to support an additional penalty. 431 U. S. at 117 (Stevens, J., concurring), 118 (Brennan, J., concurring in result); *see* 431 U. S. at 144 n. 10 (majority opinion) (hardship exceptions available only after revocation order is finalized).

A host of factors distinguish this case from *Dixon* v. *Love* and, conversely, strengthen the relationship between this case and *Bell* v. *Burson*. First, in *Dixon* v. *Love* a driver could obtain relief from the revocation order on the basis of a "commercial driver" or "hardship" exemption. In this case, no exemptions are available. Indeed, the statute precludes track officials from even granting a stay of the suspension pending the hearing. Thus a suspended trainer is precisely like the minister in *Bell* v. *Burson* who, without any prior opportunity to contest his fault or liability, was deprived of a license the "continued possession [of which had] become essential in the pursuit of a livelihood." 402 U. S. at 539. Second, the license revocation in *Dixon* v. *Love* was predicated on three prior suspension proceedings. The chance of an erroneous deprivation of a protected interest loomed no larger than the remote

possibility of clerical error. 431 U. S. at 113-114. In this case, however, suspension was a discretionary measure; the accuracy of test results was not confirmed; and the trainer's knowing participation in the alleged incident was rebutted by two lie-detector tests. The pre-hearing suspension of trainers thus seems quite similar to the unsubstantiated assumption of fault that underlay the Georgia scheme struck down in *Bell* v. *Burson*. Finally, the license revocation in *Dixon* proceeded according to a specific administrative regulation that eliminated the possibility of arbitrary action by making revocation automatic. *See* 431 U. S. at 113-115. In this case, no self-imposed regulations cabined track officials' discretion. The steward enjoyed an unfettered discretion in deciding whether the circumstances warranted suspension. This case thus closely resembles *Bell* v. *Burson*, where the suspension could be stayed pending the relatively open-ended discretionary judgment of an administrator that the driver had "filed . . . evidence satisfactory to [the administrator] that the person who would otherwise have to file security has been released from liability or been finally adjudicated not to be liable or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments." 402 U. S. at 536 n. 1.

Cases cited by appellants fail to support the bald claim that the "Court has repeatedly held that an opportunity to be heard need not be given until some time after" the deprivation of a protected property interest, Brief for Appellants at 12-13. *Board of Regents*

v. *Roth*, 408 U. S. 564 (1972), held that no constitutionally protected property or liberty interests had been taken from the claimant. The plurality opinion in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974) held that no deprivation of a protected interest had occurred. *See* 416 U. S. at 154 (1974) ("bitter with the sweet"). Justices Blackmun and Powell concurred in the result in *Arnett* on the ground that the procedural protections available to the employee prior to dismissal "comport[ed] with due process," 416 U. S. at 171, and not on the ground that—as in the instant case—the individual was entitled to *no* due process protection prior to the suspension. *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), similarly held only that an administrative hearing based on written evidence from both sides, rather than a full dress evidentiary hearing, satisfied the requirements of due process implicated in the termination of disability benefits. The *Mathews* Court in no way suggested that the benefits could be constitutionally terminated without *any* hearing. *See* 424 U. S. at 325 n. 4, 339-347.

The prisoners' rights cases of *Meachum* v. *Fano*, 427 U. S. 215 (1976), and *Montayne* v. *Haymes*, 427 U. S. 236 (1976), do not reach to the constitutional question raised by this case. In both cases, the Court's decision turned on the definition, identification and existence of a protected interest—rather than upon the determination of what procedures are required by due process. *See* 427 U. S. at 226-229 (*Meachum*); 427 U. S. at 242 (*Montayne*). The school discipline case of

Ingraham v. *Wright,* 430 U. S. 651 (1977), is likewise properly read as holding that no protected interest was infringed, since the student's liberty interest was qualified by the school's "common-law privilege" of inflicting reasonable corporal punishment. *See* 430 U. S. at 676 ("there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege").

A pointillist view of the Court's major due process decisions reveals, contrary to appellants' ascertions, that *Bell* v. *Burson's* proclamation that "it is fundamental that except in emergency situations . . . [the state] must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective," 402 U. S. at 542 (emphasis in original), has not been undercut. We submit that the three-judge court's uncontested findings that trainers "cannot recapture the racing opportunities lost by missed meetings," that "an owner will immediately seek the services of another trainer so that the horse is not barred from racing," and that the "change [to another trainer] is often permanent," J. S. at 7a, causing an "irremediable" loss of current income and future business opportunities, make the facts of this case analytically indistinguishable from the loss of livelihood that forms the common bond in a large number of the Court's cases requiring or approving pre-deprivation hearings of one form or another. *E.g., Goldberg* v. *Kelley,* 397 U. S. 254 (1970) (termination of welfare benefits); *Sniadach* v. *Family Finance*

Corp., 395 U. S. 337 (1969) (garnishment of wages); *Bell* v. *Burson,* 402 U. S. 535 (1971) (suspension of driver's license "essential in the pursuit of a livelihood"); *Arnett* v. *Kennedy,* 416 U. S. 134 (1974) (termination of government employment); *Mathews* v. *Eldridge,* 424 U. S. 236 (1976) (discontinuance of disability benefits received in lieu of wages).

Moreover, the deprivation suffered here is "irremediable," J. S. at 7a. Unlike the employees in *Arnett* and *Sniadach* or the beneficiaries in *Goldberg* v. *Kelley* and *Mathews* v. *Eldridge,* who could at least be compensated by the payment of retroactive wages or benefits if the deprivation proved erroneous, a trainer cannot recoup lost earnings caused by an erroneous suspension. The purses awarded for races held during the suspension will have been distributed among those owners and trainers who participated. *See* J. S. at 7a.

We consider it more than strange that appellants fail even to mention the Court's most recent due process decision, *Memphis Light, Gas and Water Division* v. *Craft,* 46 U.S.L.W. 4398 (U. S. May 1, 1978), in their brief, because in that case the Court reaffirmed that "[o]rdinarily, due process of law requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest." 46 U.S.L.W. at 4403. Appellants' claim that the "Court has repeatedly held that an opportunity to be heard need not be given until some time after" the deprivation of a constitutionally protected property interest, Brief for

Appellants at 12, neither commands the support of the cases specifically relied upon by appellants, nor comports with the established principles of due process jurisprudence, including a decision rendered the very month appellants filed their brief in this Court.

C. *Interest Balancing and Summary Suspensions.* Appellants' righteous indignation, *see* Brief for Appellants at 19 ("blatant fraud upon the public and other participants . . . gross disservice to the State"), seems rather overweening. Appellants apparently confuse the state's interest in honest racing with the state's interest in suspending a trainer before a hearing rather than after. A determination to focus on the interests implicated *in the interim* between suspension and hearing must, instead, guide the balancing of the trainer's interest in a pre-suspension hearing against the state's interest in summary action.

The trainer's interest in avoiding an erroneous suspension could hardly be greater. During the period of suspension, his loss of income is total and irremediable and he loses future business when owners make what are likely to be permanent shifts to other trainers. *See* J. S. at 27a. These findings were not disputed in the district court, *see id.*, nor are they challenged in this Court, *see* Brief for Appellants at 15.

The interests advanced by the state, on the other hand, could all be as well served by suspensions following a hearing as by summary suspensions. The interests identified by appellants are (1) protection of the integrity of racing; (2) protection of the animal;

(3) protection of the fisc; and (4) deterrence. Since discovery of illegal medication will in no way change the pari-mutuel payoff, the state's interest in ensuring that the public perceives racing to be conducted fairly is adequately served by an effective system for testing horses and punishing wrongdoers, not by the imposition of suspensions prior to a hearing. Similarly, since the animal has already received medication, the state's interest in protecting the animal is unaffected whether or not the hearing precedes the suspension.

The same can be said for the state's interest in protection of the fisc. If the state's interest here is in continued public patronage of tracks from which the state receives a share of the pari-mutuel handle, the analysis is identical to the analysis above of the state's interest in preserving the reputation of racing for fairness. And if the state's interest is in avoiding unnecessary expense, it is not present in this case: the question is not whether a hearing will be eventually afforded the trainer—it is merely a matter of timing.

A similar focus on interests in the interim also disposes of the state's claimed interest in deterrence. Surely it proves too much to contend that unjustified summary suspensions are a realistic deterrent to wrongdoing by trainers. Random imprisonment or execution of individuals has never been thought to deter crime. Instead, the state's interest in deterrence is served by a comprehensive system of testing and prosecution which ensures that those guilty of administering improper medication will be discovered and punished ap-

propriately. Whether that punishment occurs before or after a hearing is immaterial to the effectiveness of the deterrent.

A hard-pressed steward might conjure up one interest that the state has in summary suspensions as opposed to suspensions after a hearing. He could contend that summary suspensions are necessary to prevent repeat violations in the interim between suspension and the hearing by a trailer brazen enough to go double or nothing. As a factual matter, this possibility seems remote. But more importantly, it is irrelevant. If the state believes that repeat violations are a realistic possibility, it can simply accelerate the hearing date, making good on appellants' boast that a trainer can receive "a full, quasi-judicial hearing within a few days" of the test, Brief for Appellants at 11.

Indeed, a brief review of the state's treatment of this case belies appellants' assertions that the state has a significant state interest in imposing suspensions before rather than after the hearings guaranteed by law. Appellee Barchi was not informed by the presiding steward of the test results until two days after the race. J. S. at 6a. Another sixteen days passed before track officials actually suspended appellee's license. J. S. at 7a. Thus, in contrast to appellants' claim that summary suspensions are necessary "to protect the integrity of racing and the state's revenues against fraud, conflict of interest, racketeering and violence," Brief for Appellants at 11, the state's actual performance

demonstrates little concern that any member of that parade of horribles would appear during the eighteen days between the race and Barchi's suspension.

II. The Entitlement Doctrine Does Not Authorize Summary Suspensions in Regulated Industries.

A. *The Entitlement Doctrine and the Procedures Required by Due Process.* Appellants have not contested whether Barchi's license to train and race horses in New York and his right to be free of unjustified and arbitrary governmental interference with earning his livelihood, are interests protected by due process. Nor do appellants seriously contend that the state's interest in summary suspensions (as opposed to an effective disciplinary system) outweigh the trainer's interest in avoiding erroneous prehearing suspension. Rather, appellants attempt to circumvent the issue by taking a right-privilege detour:

> "[A]ppellee's privilege to work as a harness horse trainer is inextricably linked to and limited by the statute which legalized this activity. . . . Having chosen to work in this strictly regulated industry and having accepted the benefits of a license, appellee should be precluded from challenging the conditions of his licensure, including the procedures under which he is subject to being disciplined." (Brief for Appellants at 11.)

It is difficult to construe this language as anything more than an attempt to resurrect the rights-privileges doctrine. That doctrine classified public benefits such

as government employment and welfare as "privileges" rather than "rights," and held that individuals could not claim these "privileges" as constitutionally recognized interests protected by the due process clause. The doctrine therefore obviated the inquiry into what procedures might be required by due process, since *ex hypothesi* no deprivation of life, liberty or property had been effected. *See generally* VanAlstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968). But ever since the explicit rejection of the rights-privileges notion in *Goldberg* v. *Kelley,* 397 U. S. 254, 262 (1970), the Court has repeatedly eschewed the doctrine. *See, e.g., Board of Regents* v. *Roth,* 408 U. S. 564, 571 (1972); *Morrissey* v. *Brewer,* 408 U. S. 471, 481 (1972); *Graham* v. *Richardson,* 403 U. S. 365, 374 (1971).

Bell v. *Burson,* 402 U. S. 535 (1971), provides a rather complete refutation of appellants' contention that "appellee's privilege to work as a harness horse trainer is inextricably linked to and limited by the statute which legalized this activity." The factual parallels between *Bell* and this case could hardly be more exact. Both cases involved licenses "essential in the pursuit of a livelihood," *Bell* v. *Burson,* 402 U. S. 535, 539 (1971); *accord,* J. S. at 7a (district court opinion). Like the statute involved here, the Georgia statute in *Bell* v. *Burson* provided for the issuance of licenses and established a procedure for their suspension. Georgia made an argument analytically identical

to that made by appellants here, but the Court explicitly rejected it:

> "The main thrust of Georgia's argument is that it need not provide a hearing on liability because fault and liability are irrelevant to the statutory scheme. . . . But . . . . it is clear that liability . . . plays a crucial role in the Safety Responsibility Act. . . . Thus, we are not dealing here with a no-fault scheme. Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing." (402 U. S. at 541)

Appellants contend that the legislature's decision to statutorily authorize pre-hearing suspensions ends the due process inquiry. Brief for Appellants at 15 ("The Legislature in permitting this otherwise illegal activity has determined that possible irreparable injury must be subordinated to the public interest in the proper conduct of the regulated activity."). But in every case where the procedures required by due process are in question, some legislative body has determined that the requested procedure is not in the public interest. If the due process decisions of this Court teach any lesson, it is that the judiciary must make an independent determination of the relative weights of the state and individual interests involved.

The only authority upon which appellants rely for their treatment of this issue is the plurality opinion in

Arnett v. *Kennedy,* 416 U. S. 134, 152-154 (1974). But a majority of the *Arnett* Court clearly indicated its disagreement with the idea that a state's plenary power to limit substantively the extent of an entitlement necessarily includes the power to condition that entitlement upon the acceptance of specific procedural limitations upon the enforcement of an individual's rights. *Arnett* v. *Kennedy,* 416 U. S. 134, 166-167 (Blackmun and Powell, JJ., concurring in result); *id.* at 177-178 (White, J., concurring in part and dissenting in part); *id.* at 206-227 (Marshall, Douglas and Brennan, JJ., dissenting.)

B. *An Inappropriate Extension of the Entitlement Doctrine.* Even if the Court now decides to accept the doctrinal formulation of the *Arnett* plurality opinion, the result in this controversy should be no different. What the state argues for here amounts to the suggestion that a state may license away the due process clause.

The government's increasingly important role as the source of a livelihood or of an income supported by public welfare generated the entitlement doctrine.[2] This created a relationship of dependency between the government and its employees or welfare beneficiaries. Individuals in turn relied on the continued availability of public largess and structured their expectations and activities in order to qualify for governmentally distributed goods and opportunities.

[2]The following discussion draws substantially on Note, *The Supreme Court—1975 Term,* 90 Harv. L. Rev. 56, 86—104 (1976).

The entitlement doctrine was adopted in an effort to limit the reach of the rights-privileges doctrine which allowed the government to deprive a citizen of public benefits without the procedural safeguards constitutionally required prior to action such as arrest or confiscation of property. The adoption of the entitlement doctrine as a means of defining a new species of property interests protected by due process thus signaled the Court's determination to limit the ability of the state arbitrarily to take from citizens the wealth and the opportunities required for the enjoyment of life in a modern welfare state.

But the entitlement doctrine was never meant to be the sole source of the interests protected by due process. The function of the doctrine, instead, has been to identify those situations in which elements of citizen expectation, dependency and reliance combine in a fashion sufficient to generate the kind of property interests that have traditionally been afforded due process protection regardless of positive state law. This much is apparent from the subject matter of the cases in which the doctrine has figured most prominently. *E.g., Memphis Light, Gas and Water Division* v. *Craft,* 46 U.S.L.W. 4398 (U. S. May 1, 1978); *Bishop* v. *Wood,* 426 U. S. 341 (1976) (public employment); *Meachum* v. *Fano,* 427 U. S. 215 (1976) (conditions of incarceration); *Goss* v. *Lopez,* 419 U. S. 565 (1975) (public education); *Perry* v. *Sindermann,* 408 U. S. 593 (1972) (state employment); *Board of Regents* v. *Roth,* 408 U. S. 564 (1972) (same); *Bell* v. *Burson,* 402 U. S. 535

(1971) (operation of motor vehicle); *Goldberg* v. *Kelley,* 397 U. S. 254 (1970) (welfare benefits).

The state's argument in this case, however, constitutes an unwarranted extension of the entitlement doctrine. Indeed, it inverts the entitlement doctrine. The doctrine has been employed as a means of defining new property interests to be protected against arbitrary state deprivation. The state now contends that by the simple expedient of deciding to license a particular occupation, it can scuttle any claims to constitutional protection not included in the licensing statute. Surely that is a proposition too extravagant to be maintained.

There can be no doubt that revolutionary America believed that fundamental, inalienable rights and liberties existed irrespective of the positive law of government. "Such rights and liberties, said John Dickinson in 1776, were 'not annexed to us by parchments and seals . . . [T]hey are founded on the immutable maxims of reason and justice.' " G. Wood, *The Creation of the American Republic,* 1776-1787, at 293 (1969). In *The Ideological Origins of the American Revolution* 78 (1967), Bailyn confirms that Americans recognized that

> "the provision of English law did not and properly could not wholly exhaust the great treasury of human rights. No documentary specifications ever could. Laws, grants, and charters merely stated the essentials . . . insofar, and only insofar, as they had come under attack in the course of English history. . . . To claim more, to assert

> that all rights might be written into a comprehensive bill or code was surely, James Otis declared, 'the insolence of a haughty and impervious minister . . . the flutter of a coxcomb, the pedantry of a quack, and the nonsense of a pettifogger.' "

The state eloquently explains how racketeering, corruption and violence in the past necessitated that the state play some role in the regulation of racing. Brief for Appellants at 6-10. A similar, but less extreme, possibility of fraud upon and injury to the public interest has required the states to regulate and license the practice of medicine and the practice of law. But we find it difficult to believe that the entitlement doctrine would permit the states to summarily suspend the licenses of attorneys and physicians—or any other licensed businesses—simply because the licensing statutes purported to give state authorities the power to suspend licenses without affording a licensee the opportunity to contest the suspension. Certainly a trainer of harness horses can expect no less.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1978, three copies of this Motion and the accompanying Brief *Amicus Curiae* were mailed, postage prepaid, to Attorney General Louis J. Lefkowitz, Two World Trade Center, New York, New York 10047, Counsel for Appellants, and to Mr. Joseph A. Faraldo, 125-10 Queens Boulevard, Kew Gardens, New York 11415, Counsel for Appellee. I further certify that all parties required to be served have been served.

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